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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 679

AETNA INSURANCE COMPANY,
A CORPORATION, ET AL.,
Petitioners,

vs.

HART-BARTLETT-STURTEVANT GRAIN COMPANY,
A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

DONALD N. CLAUSEN,
HERBERT W. HIRSH,
135 South La Salle Street,
Chicago, Illinois,
WILLIAM S. HOGSETT,
906 Grand Avenue,
Kansas City, Missouri,
Counsel for Petitioners.

CLAUSEN, HIRSH & MILLER,
135 South La Salle Street,
Chicago, Illinois,
HENRY DEPPING,
1200 Waltower Building,
Kansas City, Missouri,
HOGSETT, HOUTS, JAMES, RANDALL & HOGSETT,
906 Grand Avenue,
Kansas City, Missouri,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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The Supreme Court of Missouri deprived Petitioners of the privileges granted by Article IV, Section 1 of the Constitution of the United States by failing to accord full faith and credit to a prior final judgment of the United States District Court for the District of Kansas, which said judgment finally adjudicated an issue which, per se, controlled the outcome of the litigation in the State Courts of Missouri. A violation of the Full Faith and Credit Clause, such as invoked here, has been one of the grounds frequently moving this Court to grant certiorari .. 29

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ers upon a policy of insurance affording coverage on property at the same location in Kansas for loss caused by explosion; in each case the right of the insured to recover depended upon whether these particular occurrences were explosions; in the prior final judgment in Kansas, it was adjudicated that the occurrences were not explosions; such final determination of the issue of explosion, under the doctrine of collateral estoppel, was binding upon respondent and was actually determinative of petitioners' rights in the Missouri case..... 34

1. The Supreme Court of Missouri, in refusing to accord full faith and credit to the Kansas judgment, mistakenly measured the Insurers' rights by an inapplicable standard, and failed to recognize the collateral estoppel arising out of the adjudication of the explosion issue in the Kansas case. The doctrine of collateral estoppel is, of course, recognized by this Court, and is within the purview of the Full Faith and Credit Clause..... 34

2. The collateral estoppel arising from the Kansas adjudication that the occurrences were not explosions, was binding upon the Grain Company because (a) the Grain Company injected the explosion issue into the Kansas litigation; (b) because the Grain Company claimed the the recovery, if any, received by its lessors from the Insurers and was the real, though not nominal, plaintiff in the third party proceedings, and (c) because the Grain Company, in reality, was responsible for the trial of the explosion issue. 40

3. The Supreme Court of Missouri failed to observe that the Insurers, in their Answer pleaded fully the facts giving rise to the collateral estoppel and that the Grain Company failed to reply to such Answer. Under Missouri law the Grain Company is deemed to have ad-

mitted all of the facts pleaded. The trial judge in the Missouri case, in rendering judgment there in favor of the Insurers, properly predicated such ruling in part upon the affirmative collateral estoppel defense relied on by the Insurers, which absent any reply, had to be taken as admitted 59

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No. .....

AETNA INSURANCE COMPANY, AGRICULTURAL INSURANCE COMPANY, AMERICAN ALLIANCE INSURANCE CO., AMERICAN EAGLE FIRE INSURANCE CO., AMERICAN EQUITABLE ASSURANCE CO., AMERICAN INSURANCE COMPANY, ATLAS ASSURANCE COMPANY, LTD., AUTOMOBILE INSURANCE COMPANY, BOSTON INSURANCE COMPANY, CAMDEN FIRE INSURANCE ASSOCIATION, THE CENTURY INSURANCE CO., LTD., COMMERCIAL UNION ASSURANCE CO., LTD., CONTINENTAL INSURANCE COMPANY, DUBUQUE FIRE & MARINE INSURANCE CO., FIDELITY-PHENIX FIRE INSURANCE CO., FIRE ASSOCIATION OF PHILADELPHIA, FIREMAN'S FUND INSURANCE CO., FIREMEN'S INSURANCE COMPANY, GLENS FALLS INSURANCE COMPANY, GREAT AMERICAN INSURANCE CO., HANOVER FIRE INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, HOME INSURANCE COMPANY, ILLINOIS FIRE INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, KANSAS CITY FIRE & MARINE INSURANCE CO., THE LONDON, LANCASHIRE INSURANCE CO., LTD., MERCURY INSURANCE CO., MONARCH FIRE INSURANCE CO., NATIONAL FIRE INSURANCE CO., NATIONAL UNION FIRE INSURANCE CO., NEW HAMPSHIRE FIRE INSURANCE CO., NEW YORK UNDERWRITERS INSURANCE CO., NIAGARA FIRE INSURANCE CO., NORTH BRITISH & MERCANTILE INS. CO., LTD., NORTHERN ASSURANCE CO., LTD., NORTHWESTERN FIRE & MARINE INS. CO., PHOENIX ASSURANCE COMPANY, LTD., PHOENIX INSURANCE COMPANY, PROVIDENCE WASHINGTON INSURANCE CO.,

ROYAL INSURANCE COMPANY, LTD., ST. PAUL FIRE & MARINE INS. CO., SCOTTISH UNION & NATIONAL INS. CO., SECURITY INSURANCE COMPANY, SPRINGFIELD FIRE & MARINE INSURANCE CO., SUN INSURANCE OFFICE, TRAVELERS FIRE INSURANCE CO., UNITED STATES FIRE INSURANCE CO.,

Petitioners,

vs.

HART-BARTLETT-STURTEVANT GRAIN COMPANY, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

Your petitioners respectfully show:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Missouri, entered in the above entitled case on September 21, 1956.

(Throughout the following Petition, references to the certified transcript of the proceedings in the Supreme Court of Missouri will be indicated "Mo.S.C.Tr......"; references to the certified transcript of the proceedings and evidence in the Circuit Court of Jackson County, Missouri, certified by the Clerk of the Supreme Court of Missouri, will be indicated "Tr. ....."; references to the Estoppel Exhibit offered during the trial in the Circuit Court of Jackson County, Missouri, and also certified by the Clerk of the Supreme Court of Missouri, will be indicated "Estop. Exh. .....".)

THE OPINION BELOW.

The opinion of the Supreme Court of Missouri, in cause therein, numbered 44944, has been reported and appears at 293 S. W. 2d 913. The opinion is appended hereto in the Appendix, pages i to xxxvi.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i) The decision of the Supreme Court of Missouri was rendered on September 10, 1956 (Mo.S.C.Tr. 4-33), but because of the contingency of a remittitur ordered by that court, the judgment of that court was not entered until September 21, 1956 (Mo.S.C.Tr. 34, 35).

(ii) A motion for rehearing, or, in the alternative, to transfer said cause to the Supreme Court of Missouri, *en banc*, was filed by petitioners, appellees below (Mo.S.C. Tr. 35) and on October 8, 1956, the Supreme Court of Missouri entered an order denying said motions for rehearing and alternate relief (Mo.S.C.Tr. 124).

(iii) The jurisdiction of this Court is invoked under United States Code, Title 28, Section 1257(3), providing for review of decisions of the highest courts of review of the several states.

QUESTION PRESENTED.

The question raised by this petition is whether the judgment of the Supreme Court of Missouri (which set aside a judgment entered below by the Circuit Court of Jackson County, Missouri, in favor of petitioners, and reinstated a verdict and judgment in excess of $698,000, in favor of respondent) deprived petitioners of the rights and privileges granted by Article IV, Section 1 of the Constitution of the United States, by failing to accord full faith and

credit to a final judgment of the United States District Court for the District of Kansas, in which case the respondent here was a party, and which said judgment finally adjudicated (in favor of petitioners) the principal issue of fact which should have controlled the outcome of the litigation in the Missouri courts.

STATUTES AND ORDINANCES, ETC.

Article IV, Section 1 of the Constitution of the United States (The Full Faith and Credit Clause) (see Appendix, p. xxxix).

STATEMENT OF THE CASE.

We are fully cognizant of the desirability of a concise statement of the case. However, the case at bar is one in which no clear understanding of the issue presented is possible without a comprehensive statement of the facts and circumstances involved in, and surrounding both the Missouri and the Kansas cases. In this connection we ask this Court's indulgence with respect to the length of the statement of the case.

The Missouri Litigation.

On July 26, 1952 respondent (hereinafter sometimes referred to as the "Grain Company") filed an action at law in the Circuit Court of Jackson County, Missouri against the forty-eight insurance companies, defendants below and petitioners here (hereinafter sometimes referred to as the "Insurers"), upon three insurance policies affording coverage against fire and other perils, including explosion (Tr. 1-35).

These insurance policies were issued in the name of Underwriters Grain Association, an association composed of the forty-eight insurance companies, petitioners here. (The same Underwriters Grain Association, composed of the same forty-eight insurance companies also issued the policies upon which recovery was sought in the Kansas action, which is hereinafter discussed.) One of such policies covered the grain in the elevator known as "River Rail Elevator" located in Kansas City, Kansas, occupied by respondent as lessee (Tr. 9-18). The other two policies covered loss due to interruption of business caused by the perils so insured against (Tr. 19-35). Such action sought recovery for the value of grain damaged and for loss claimed to be due to interruption of business resulting from occurrences alleged to be explosions. The Grain Company sought judgment for more than $728,000.00 (Tr. 4, 8).

On or about August 15, 1952 the Insurers removed said action to the United States District Court for the Western District of Missouri, Western Division. Thereafter, the Grain Company moved to remand said cause to the Circuit Court of Jackson County, Missouri, and said motion to remand, after extended argument, was ultimately sustained. Although the Insurers contend that such order was erroneous, no right of review of such erroneous order was available to the Insurers, and further proceedings were had in said cause, so remanded to the Circuit Court of Jackson County, Missouri.

The Grain Company's right of recovery depended upon the single question of fact as to whether the occurrences causing the damage to the Grain Company were or were not explosions. As shown with greater particularity hereinafter, the Grain Company's damage occurred during the widespread and catastrophic flood of the Missouri and Kaw Rivers which affected the Greater Kansas City area during the middle of July, 1951. Thousands of persons

and industries were affected by such flood, and River Rail Elevator, occupied by the Grain Company, standing on or near the bank of the Missouri River, like thousands of others, was engulfed by the flood waters which infiltrated into the basement and lower portions of the bins in the Elevator. A few days after the infiltration of such flood waters certain events occurred affecting a number of the bins which the Grain Company characterized as "explosions". Whether or not such events were explosions was the single question of fact determinative of the Grain Company's right to recover on the policies. However, in the Missouri case, the Insurers defended not only upon the ground that the occurrences were not explosions, *but also upon the ground, specially pleaded* (Tr. 47-57), *that this very fact had already been adjudicated on November 12, 1953 adversely to the Grain Company in certain litigation (hereinafter sometimes referred to as the "Kansas case"), previously pending in the United States District Court for the District of Kansas to which the Grain Company was a party; such Kansas case, discussed in detail in the next section, resulted in a final judgment in favor of these same Insurers (petitioners here), from which no appeal was prosecuted by any of the parties; that such final judgment, under the doctrine of collateral estoppel, operated to preclude the Grain Company from ever re-litigating, in Missouri or elsewhere, the question of whether the occurrences were explosions.* The Grain Company failed to file any reply in the Missouri actions to the Insurers' plea of collateral estoppel.

The Missouri case proceeded to trial and the Insurers offered in evidence a certified copy of such final judgment in the Kansas case (Def. Ex. 99; Tr. 1116), and also offered in evidence their "Estoppel Exhibit" consisting of the essential pleadings, orders, judgments and a transcript of all of the testimony in the Kansas case (Tr. 1146).

The trial judge did not send defendants' Exhibit 99 (the certified copy of the final judgment in the Kansas case) nor the comprehensive Estoppel Exhibit to the jury, but saved them for his consideration on the Estoppel issue (Tr. 1116, 1146). The Estoppel Exhibit, collectively, was the repository of the particular facts and circumstances disclosing the prior adjudication of the single question of fact as to whether the occurrences were or were not explosions, and established the facts which supported petitioners' contention that the final judgment in the Kansas case should be accorded full faith and credit by the Missouri court.

At the conclusion of the evidence, the Missouri cause was submitted to the jury, and on February 4, 1955 the jury returned a verdict in the amount of $769,522.74 in favor of the Grain Company and against all the Insurers (Tr. 1241), and judgment was thereupon entered (Tr. 1243, 1244).

The Insurers moved for judgment in their favor in accordance with their motion for directed verdict made at the close of all the evidence (Tr. 1244). In such motion (Tr. 1245) one of the grounds relied on by the Insurers was the defense of collateral estoppel arising by virtue of the prior final judgment in the Kansas case adjudicating that the very same occurrences were not explosions. The Insurers contended that the failure of the Missouri court to recognize the prior adjudication, by refusing to give full faith and credit to such prior federal court judgment, was in direct violation of Section 1 of Article IV of the Constitution of the United States. This particular ground of the motion recited the following (Tr. 1245):

> "7. Since it has previously been judicially determined that the very occurrences in the case at bar were not explosions by the United States District Court for the District of Kansas, in case No. KC-228,

in which case the plaintiff here was plaintiff and the defendants here were third party defendants, the failure of this court to hold that such prior judgment estops the plaintiff from relitigating that question here amounts to a failure by this court to give full faith and credit to such prior federal court judgment, all in violation of Section 1 of Article IV of the Constitution of the United States."

The trial judge, on May 11, 1955 sustained the Insurers' motion for judgment in accordance with their motion for directed verdict at the close of all the evidence, and in sustaining such motion, the following order was entered (Tr. 1249):

"That part of defendants' motion where in the alternative they ask for a new trial is overruled. Defendants' motion for judgment in accordance with their motion for directed verdict at the close of all the evidence is sustained, for the reasons:

One: The evidence conclusively shows that all of plaintiff's loss was caused by flood (a hazard not insured against), not by any explosion.

Second: There is no evidence on which a jury could base a verdict for plaintiff on the explosive issue without resorting to guess work, speculation, conjecture and surmise.

Third: It has previously been judicially determined that the very occurrences in the case at bar were not explosions, and therefore plaintiff is estopped from relitigating that question.

WHEREFORE, IT IS ORDERED ADJUDGED AND DECREED That defendants' motion for a new trial is overruled; that defendants' motion for judgment in accordance with their motion for a directed verdict at the close of all the evidence is sustained. The court now sets aside the verdict and judgment heretofore rendered and enters a judgment in favor of the defendants, the costs of this action to be assessed against the plaintiff." (Emphasis supplied.)

In entering such order, the trial judge, having previously reserved both Defendants' Exhibit 99 and the Insurers' Estoppel Exhibit (Tr. 1116, 1146), for his consideration of the Estoppel issue, manifestly regarded both exhibits as being admissible upon the estoppel issue, since the trial court's finding on the question of the collateral estoppel was necessarily based upon the contents of the Insurers' Estoppel Exhibit, and the certified copy of the judgment in the Kansas case.

The Grain Company appealed from said judgment to the Supreme Court of Missouri, the controversy being one appealable directly to that court. Upon such appeal the Grain Company contended that the trial court erroneously sustained the Insurers' motion for judgment, grounded in part upon the collateral estoppel arising from the prior adjudication in the Kansas case. Upon such appeal, the Insurers contended that the trial judge properly held that the Grain Company was precluded from relitigating the explosion issue. (At that stage of the appellate proceedings the Insurers, having been granted below the benefit of the prior adjudication, had not yet been deprived of the rights or privileges of the Full Faith and Credit clause of the Constitution). However, on September 10, 1956, Division No. 1 of the Supreme Court of Missouri rendered its decision reversing the judgment entered below by the Circuit Court of Jackson County, Missouri, in favor of the Insurers, and directed that, upon the Grain Company agreeing to a remittitur in the amount of $71,005.12, the original judgment in favor of the Grain Company should be affirmed in the amount of $698,517.62 as of February 4, 1955, the date upon which the original verdict and judgment was entered. In such opinion (Appendix, pp. xxix to xxxv), in effect, the court, speaking through a commissioner, refused to hold that the prior adjudication relative to the explosion is-

sue was binding upon the Grain Company. By such ruling, the Supreme Court of Missouri then and there deprived the Insurers of the rights and privileges of the Full Faith and Credit clause of the Constitution of the United States. The Insurers filed a motion for rehearing, or, in the alternative, to transfer the cause to the Supreme Court of Missouri, *en banc* (Mo.S.C.Tr. 36-92). In such motion for rehearing, and for other relief the Insurers asserted that the failure of the Supreme Court of Missouri to sustain the defense of the collateral estoppel was a violation of the Insurers' rights under the Full Faith and Credit clause of the Constitution (Mo.S.C. Tr. 87-89). In the opinion rendered by the Supreme Court of Missouri it is manifest that such court of review, as well as the trial court, had considered the contents of the Insurers' Estoppel Exhibit. Notwithstanding, the Insurers' motion for rehearing, or alternate relief, was overruled by the Supreme Court of Missouri on October 8, 1956 (Mo.S.C.Tr. 124). The Grain Company having already agreed to the remittitur (Mo.S.C.Tr. 33a), the decision and judgment rendered by the Supreme Court of Missouri thereupon became the final judgment of the highest court of review of the State of Missouri.

The Prior Kansas Litigation.

On June 26, 1952 the Grain Company, by Blackmar, Newkirk, Eager, Swanson & Midgely, the same counsel who appeared in the Missouri litigation, commenced an action in the United States District Court for the District of Kansas against the Minnesota Avenue, Inc., a corporation, and the City of Kansas City, Kansas, a municipal corporation, as defendants (hereinafter sometimes referred to as the "lessors") (Estop. Exh. Vol. I, pp. 1-4). Said case, numbered KC-228 in said court, was an action at law

by the Grain Company, as plaintiff, seeking reimbursement from the defendants, from whom it leased River Rail Elevator at Kansas City, Kansas, of moneys which the Grain Company had expended after the 1951 flood to repair and rehabilitate River Rail Elevator, *being the same elevator involved in the Missouri case, and the occurrences giving rise to such claim for reimbursement being the same occurrences which the Grain Company relied on as alleged explosion in the Missouri case.* In its complaint in Case No. KC-228, the Grain Company alleged, *inter alia*, in paragraphs 6 and 7 (Estop. Exh. Vol. I, p. 2), the following:

> "6. Commencing on or about July 13, 1951, there occurred a great flood in the Greater Kansas City area and flood waters penetrated to the aforesaid elevator facilities.
>
> 7. Thereupon the leased facilities sustained severe damage by reason of the casting of flood waters on and about them and *by reason of explosions caused by action of flood water upon grain*, and otherwise. * * *" (Emphasis supplied.)

Thereafter, over the objection of the Grain Company, upon motion of the lessors, leave was granted to said lessors to file a Third Party Complaint against the forty-eight insurance companies (who are the petitioners here) (Estop. Exh. Vol. I, p. 84). Said third-party complaint sought recovery upon certain policies of insurance (issued by the same forty-eight insurance companies, petitioners here) said complaint claiming that certain events had occurred, which if they were in fact explosions, gave rise to liability upon the policies (Estop. Exh. Vol. I, pp. 69, 70).

The Insurers, as third-party defendants, defended on the ground that the occurrences giving rise to the Grain Company's damage (for which the lessors might be liable) were not explosions (Estop. Exh. Vol. I, p. 87). Before

trial, the Grain Company filed a First Amended Complaint (Estop. Exh. Vol. I, pp. 92-95) against its lessors which was essentially the same as its original Complaint, except that paragraph 7 of the Amended Complaint was revised to read (Estop. Exh. Vol I, p. 93):

> "Thereupon the leased facilities sustained severe damage by reason of the casting of flood waters on and about them and by reason of action of flood waters upon grain, and otherwise. * * *"

Thereafter, the lessors, as third party plaintiffs, filed an Amended Third Party Complaint which differed from their original Third Party Complaint by alleging that the damages referred to in the Grain Company's Amended Complaint "were in fact proximately caused by an explosion or explosions in and about the leased premises, occurring at the time and place of the flood and *the alleged damages set out in the First Amended Complaint of the plaintiff herein (the Grain Company)*." (Parenthetical explanation and emphasis supplied).

The case proceeded to trial upon the issues between the Grain Company and its lessors, and upon the issues framed by the third party proceedings (Estop. Exh. Vol. I, p. 140).

The jury returned a verdict in the amount of $95,032.88 in favor of the Grain Company on its Complaint against its lessors. The jury was unable to agree with respect to the issues framed under the third party proceedings, and because of such disagreement the jury was ultimately discharged.

After such proceedings, the Insurers moved for a finding and judgment in their favor in the third party proceedings in accordance with their motion for directed verdict made at the close of all the evidence. The United States District Judge sustained the Insurers' motion, ruling as a matter of law, that the occurrences in question which

caused the damages of the Grain Company for which it sought reimbursement from its lessors, were not explosions (such occurrences being the same occurrences upon which the Grain Company sought recovery against the same Insurers in the Missouri case).

On November 12, 1953 the United States District judge entered a final judgment in favor of the Insurers as follows (Estop. Exh. Vol. I, p. 216):

> "Now, on this 29th day of October, 1953, this cause came on to be heard on the motion of third party defendants for judgment in accordance with their motion for directed verdict interposed at the close of all the evidence, and the Court having heard the arguments of counsel and being well advised in the premises finds that said motion of third party defendants for a directed verdict should be sustained and that judgment should be entered sustaining said motion, and the Court determines that there is no just reason for delay in the entry of judgment in favor of third party defendants on the amended third part complaint, and the Court now directs the entry of such judgment.
>
> IT IS THEREFORE ORDERED AND ADJUDGED that the motion of third party defendants for judgment in accordance with their motion for directed verdict interposed at the close of all the evidence be and the same is hereby sustained, and that the third party defendants have and recover judgment against the third party plaintiffs for their costs herein."

As will be demonstrated in a succeeding section of the Statement of the Case, the damages for which the Grain Company sought reimbursement from its lessors in the Kansas case arose out of the identical occurrences which the Grain Company, in the Missounri case, claimed were explosions. As will be shown hereinafter, the Grain Company, in the Missouri case sought to recover for some of the very same items for which it sought reimbursement from its lessors in the Kansas case (Estop. Exh. Vol. VI,

p. 1997). Further, as will be observed with greater pa ticularity hereinafter, the Grain Company, in the Kansa case was informed that the Insurers (who were at tha time defendants to the Grain Company's action in the Mi souri case) would regard that the disposition of the explo sion issue made in the Kansas case actually controlled th outcome of the litigation in the Missouri case (Estop. Exh Vol. VI, pp. 1818-1822). Notwithstanding these circum stances, the Grain Company took no appeal from any o the rulings or the final judgment entered by the Unite States District Court in the third party proceedings i the Kansas case, although it did file notice of appeal fro the final judgment against its lessors, claiming that it wa entitled to more than the amount of the verdict. Suc appeal was subsequently abandoned. The Grain Com pany's lessors filed a Notice of Appeal from the fina judgment entered upon the third party proceedings i favor of the Insurers, and also filed a Notice of Appea from the judgment in favor of the Grain Company. How ever, both of such appeals, on April 28, 1954 were dis missed upon motion of the appellants themselves, and there upon the judgment of the United States District Court finding that the occurrences there in question (being th same occurrences in question in the Missouri case) were not explosions, became final. It is this final judgment of the United States District Court for the District of Kansas to which the Supreme Court of Missouri refused to accord full faith and credit.

The Explosion Issue Was Actively Litigated by the Grain Company in the Kansas Case.

The following additional facts are necessary for a clear understanding of the issue presented here.

River Rail Elevator, situated near the banks of the Mis souri River in Kansas City, Kansas, was enveloped by the flood waters of the July 1951 flood. At the time of the flood

the Grain Company was the lessee of such elevator, conducting a grain storage business therein. The Grain Company was lessee of such elevator under a written Lease with the City of Kansas City, Kansas, with respect to which the lessors' interest had been assigned to the Minnesota Avenue, Inc., a corporation (Estop. Exh. Vol. I, p. 1). In said Lease between the Grain Company and its lessors, which was attached as Exhibit A to the Grain Company's Complaint in the Kansas case, it was provided, *inter alia*, on page 6 thereof as follows:

> "The *Lessor* covenants and agrees that it will without cost to the Lessee, during the term of this Lease, do all of the maintaining and repairing of the elevator building and structures, * * *. * * * Provided, further, that if at any time any extraordinary accident not occasioned by the negligence of the Lessee or its employees should occur, the *Lessor shall at its own expense promptly and diligently proceed to repair the same* after being requested so to do." (Emphasis supplied).

Said lease provided further, at page 7:

> "If during the term hereof said buildings, machinery and equipment provided by the lessor upon the property herein leased be destroyed or damaged by fire or other casualty to the extent that the same be rendered unfit for occupancy, *the lessor engages to use all the proceeds, if necessary, received from any insurance policy covering such hazard to repair or rebuild buildings or improvements* * * *." (Emphasis supplied.)

As mentioned above, the Grain Company filed its action at law in the United States District Court for the District of Kansas against its lessors alleging (Estop. Exh. Vol. I, pp. 2-4) that the Elevator had been damaged by reason of explosions caused by the flood waters, that the Grain Company had requested its lessors to repair and rehabilitate the Elevator to a proper state of tenantability, that its lessors refused to make the necessary repairs, that the

Grain Company repaired and restored the Elevator and in so doing expended upwards of $160,000.00. The defendant lessors answered such complaint (Estop. Exh. Vol. I, pp. 5-10) asserting a number of defenses but the lessors, in paragraph 7 of their answer (Estop. Exh. Vol. I, p. 8) expressly denied that the damage was caused by explosion, *thus creating an issue of fact between the Grain Company and its lessors on the issue of explosion.* Thereafter, the explosion issue, which was one of the principal issues injected into the case by the Grain Company, became a matter of major importance between the parties and the subject of active litigation, and in addition the Grain Company, as shown by the position manifested by it in their litigation (Estop. Exh. Vol. I, pp. 51-53), sought to avail itself of the insurance against explosion carried by its lessors with the same forty-eight Insurers, petitioners here.

Some months after the Grain Company's action was filed in Kansas, and *before the Insurers were made third party defendants,* the lessors propounded certain interrogatories to the Grain Company. Interrogatory IV specifically required the Grain Company to state the damages caused by explosion to the buildings, structures, machinery and equipment (Estop. Exh. Vol. I, p. 12). Interrogatory XVIII required the Grain Company to state and identify the locations where the explosions occurred (Estop. Exh. Vol. I, p. 15). Interrogatory XIX required the Grain Company to identify by designated numbers the storage bins which suffered structural damage (Estop. Exh. Vol. I, p. 15). The Grain Company answered such interrogatories as follows:

> Answering Interrogatory No. IV the Grain Company stated under oath that the damage definitely attributable to explosion consisted of the blowing out of the steel hopper bottoms in 42 of the storage bins and the lower grain drier bin, and damage by twisting, distortion and falling to the spouting leading from

each bin so blown out with resultant augmented damage to structures, machinery and equipment as above set forth due to the addition of the large amount of grain to the flood waters in the basement. In addition, the cost of cleaning out grain in order to make repairs, as set forth in answer to Interrogatory 14, was directly attributable to the explosions (Estop. Exh. Vol. I, p. 33).

Answering Interrogatory XVIII the Grain Company stated under oath that explosions occurred in each of the bins listed in their answer to Interrogatory XIII, reference to which answer listed 22 specifically numbered bins in "A" Storage House and 20 specifically numbered bins in "B" Storage House, and in addition the lower drier bin (Estop. Exh. Vol. I, p. 37).

Answering Interrogatory XIX the Grain Company stated under oath that there was structural damage to all bins in the elevator, necessitating putting hoppers and spouts in alignment, replacement of all steel clips, and cleaning and painting after completion of these repairs, together with other replacements shown in answers to other interrogatories (Estop. Exh. Vol. I, p. 37).

While the Grain Company contended that it was not a matter of materiality *to its right to recover from its lessors* whether the damage was caused by flood or explosion, the Grain Company consistently and necessarily contended that the damage was caused by explosion, in order to establish itself as the rightful and proper claimant to, and a *quasi third party beneficiary* of its lessors' recovery against the forty-eight Insurers which had issued the policies to the lessors covering the peril of explosion.

It should be further noted that in the Grain Company's answers to the interrogatories propounded by its lessors, the Grain Company stated under oath (answer to Interrogatory II) (Estop. Exh. Vol. I, p. 30):

"* * * The explosions were caused by the infiltration of flood waters into the bins causing a partial fer-

> mentation of the grain therein and causing the individual kernels to swell. As a result of the swelling and crusting of the grain air-tight chambers were created at the bottoms of certain bins, and as the generation of fermentation gases continued, finally burst from these air-tight chambers with explosive force. * * *"

These statements of purported fact made by the Grain Company under oath in the Kansas case were the identical factual contentions made by the Grain Company in the Missouri case.

The Grain Company propounded interrogatories to its lessors in which, in Interrogatory 17 (Estop. Exh. Vol. I, p. 25), the Grain Company asked for information as to what part of its conduct may have contributed to an explosion at the leased premises, the lessors, in their answers to the complaint, having charged that the Grain Company was guilty of conduct contributing to the explosion (Estop. Exh. Vol. I, p. 8). The Grain Company, by its Interrogatories 19 to 23 propounded to its lessor, The Minnesota Avenue, Inc. (Estop. Exh. Vol. I, pp. 26-28), sought information relative to the prosecution of a claim by the lessors against the insurance companies for loss caused by the alleged explosion.

The lessors answered such interrogatories, reciting the conduct of the Grain Company which they believed contributed to the explosion, *if the occurrence was an explosion* (Estop. Exh. Vol. I, p. 25), and further set forth the information sought by the Grain Company relative to the insurance carried by the lessors, disclosing in detail the amount of coverage, the number and identity of the policies and the names of the insurers (Estop. Exh. Vol. I, pp. 26-28).

The explosion issue, after having first been injected in the case by the Grain Company, always remained in the

case, and was further emphasized by the third party proceedings brought by the lessors. The lessors moved for leave to file a third party complaint *against the same forty-eight Insurers who are petitioners here*. The Grain Company objected to the filing of such third party complaint and filed a brief in support of such objections (Estop. Exh. Vol. I, pp. 71-83). In such brief, the Grain Company recognized that the filing of such third party proceedings might operate prejudicially towards it (Estop. Exh. Vol. I, p. 71). In the same brief, the Grain Company recognized that the filing of the proposed third party complaint would necessarily involve the explosion issue, which the Grain Company, notwithstanding that it was the original proponent of such explosion issue, felt would be a "foreign question of fact", saying in its said brief (Estop. Exh. Vol. I, p. 73):

> "Thus, the third party complaint, if allowed, would inject into the case an entirely foreign question of fact. The third party complaint tendered first denies any liability to the plaintiff and denies that any explosion occurred, but states that if explosions occurred then the third party defendant insurance companies are obliged to reimburse the defendants. In order to recover from the third party defendants, the defendants would not only have to show a judgment favorable to the plaintiff, but would also have to show that the damage was caused by explosion. Otherwise no insurance would cover."

The Grain Company also recognized that if the third party complaint were allowed to be filed, the integrated trial would necessarily involve the explosion issue, saying further in its said brief (Estop. Exh. Vol. I, p. 74):

> "It goes without saying that the trial of this case on the plaintiff's complaint and defendants' answer is going to be complicated. The question of explosion or no explosion is also going to be a difficult one and will require evidence from chemists and engineers plus

> considerable legal research. It would be difficult to require submission of both of these claims to the same jury, especially when they both have no relation to each other.
>
> * * * The third party defendants, however, are liable for only such damage as is directly caused by explosion. Thus if the third party proceedings were allowed the jury would be obliged to make a further and difficult finding as to what damage was caused by the explosions."

The Grain Company further recognized that if the third party proceedings were allowed *the Grain Company might be held to be the real party in interest in the controversy between its lessors and the Insurers*, and that the adjudication on the explosion issue might be held to be *res judicata* binding on the Grain Company in its Missouri case, the Grain Company saying in this connection (Estop. Exh. Vol. I, p. 78):

> "What we fear specifically is that the plaintiff here may be held to be the real party in interest in the controversy between these defendants and the third party defendant. Thus an adjudication here might be held to be *res judicata* as to our litigation in Missouri against the same insurance companies."

Notwithstanding the efforts of the Grain Company to avoid the filing of the third-party proceedings with the legal implications and possible prejudice to the Grain Company in its Missouri litigation, the United States District Court nevertheless overruled such objections, and entered an order allowing the filing of the third-party proceedings against the forty-eight insurers, petitioners here (Estop. Exh. Vol. I, p. 84).

Thereafter, the third-party complaint was filed which, omitting the caption and signatures, was as follows (Estop. Exh. Vol. I, p. 70):

"1. Plaintiff, Hart - Bartlett - Sturtevant Grain Company, has filed against defendants, The Minnesota Avenue, Inc., and The City of Kansas City, Kansas, a Complaint, together with an attached Exhibit A, which are on file herein and are hereby made a part of this Third Party Complaint by reference.

2. In said Complaint, plaintiff alleges that the leased facilities sustained severe damage by reason of explosions on or after July 13, 1951, and the elevator facilities thereby became completely untenable and unfit for occupancy, and so continued until on or about September 21, 1951; that the lease provided that if during the term of the lease the buildings, machinery and equipment be damaged by fire or other casualty to the extent that the same be rendered unfit for occupancy, the lessor (defendants herein) engaged to use all the proceeds, if necessary, received from any insurance policy covering such hazards to repair or rebuild the buildings and improvements.

3. The third party defendants above named, by their several policies of insurance, did severally agree to insure defendant, The Minnesota Avenue, Inc., and the defendant, the City of Kansas City, Kansas, a municipal corporation, against all direct loss and damage by explosion to various parts of the leased premises, as more particularly shown by photostatic copies of said policies hereto attached and made a part hereof, marked Exhibits 6, 7, 8, 9, 10 and 11.

4. While defendant, The Minnesota Avenue, Inc., and defendant, The City of Kansas City, Kansas, a municipal corporation, by their separate Answers, deny that any of the alleged damage referred to in plaintiff's Complaint was in fact caused by explosion, said defendants nevertheless state that if said damage or any part of said damage was caused by explosion (as plaintiff alleges) then the third party defendants are severally liable to defendant, The Minnesota Avenue, Inc., and to the defendant, the City of Kansas City, Kansas, a municipal corporation, under and subject to the terms of their respective policies aforesaid for the amount of said damage by explosion.

WHEREFORE, defendants, The Minnesota Avenue, Inc., and the City of Kansas City, Kansas, a municipal corporation, as third party plaintiffs, pray judgment severally against the third party defendants above named upon, in accordance with and subject to the terms of their respective policies aforesaid, for any and all amounts of damage by explosion which may be adjudged against defendants, The Minnesota Avenue, Inc., and the City of Kansas City, Kansas, a municipal corporation, in favor of plaintiff Hart-Bartlett-Sturtevant Grain Company."

The Insurers defended on the ground that the occurrences in question, *being the same occurrences allegedly responsible for the Grain Company's damage for which recovery was sought in the Grain Company's complaint*, were not explosions, saying (Estop. Exh. Vol. I, p. 87):

> "2. As to Paragraph 4 of the Third-Party complaint, *Third-Party defendants also deny that any of the alleged damage referred to in plaintiff's complaint was in fact caused by explosion*, and admit that if said damage or any part of it was caused by explosion (as plaintiff alleges) then the Third-Party defendants are severally liable to Third-Party plaintiffs under and subject to the terms of their respective policies referred to in Paragraph 3 of said Third Party complaint for the amount of said damage by explosion." (Emphasis supplied.)

The Grain Company, still apprehensive of the implications of an adjudication that the occurrences were not explosions, moved (Estop. Exh. Vol. I, pp. 85, 86) for separate trials of the issues raised by the complaint and those raised by the third-party complaint, in which said motion the Grain Company urged separate trials on the ground, *inter alia*, that disposition of the issues between the Grain Company and its lessors would facilitate the disposition of the third-party proceedings, the Grain Company *stating that such determination would have shown*

whether the Grain Company or its lessors were the real parties in interest with respect to the third-party proceedings against the Insurers, the Grain Company saying (Estop. Exh. Vol. I, p. 85):

> "3. Disposition of the issues raised by the complaint and answers will facilitate disposition of the third party claim because *it will determine whether plaintiff or defendants are the real parties in interest with regard to the third party complaint.*" (Emphasis supplied.)

However, the United States District Court denied the Grain Company's motion for separate trials (Estop. Exh. Vol. I, p. 140).

The Grain Company filed a First Amended Complaint about six months after the commencement of its action, in which First Amended Complaint the Grain Company, as hereinabove stated, eliminated from Paragraph 7 the words "by reason of explosions" (Estop. Exh. Vol. I, p. 92). The lessors answered such First Amended Complaint, but such Answer disclosed that the explosion issue was still involved (Estop. Exh. Vol. I, p. 96).

Thereafter, the lessors filed an Amended Third Party Complaint (Estop. Exh. Vol. I, pp. 120, 121) in which they affirmatively asserted that the occurrences were explosions, and also filed an Amended Answer (Estop. Exh. Vol. I, pp. 122-133) to the Grain Company's First Amended Complaint in which the lessors affirmatively asserted (Estop. Exh. Vol. I, p. 131) that the damages described in the Grain Company's First Amended Complaint were caused by explosions.

Shortly before trial, the United States District judge entered an order with respect to the matters to be tried, ruling that (a) the issues between the Grain Company and its lessors, (b) the issues between the lessors and the Insurers, and (c) the issues in Count I of the Insurers'

Counterclaim should be tried together (Estop. Exh. Vol. I, p. 140).

Thereafter, the parties exercised extensive use of discovery proceedings; interrogatories were propounded respectively by the Insurers to the lessors (Estop. Exh. Vol. I, pp. 141-146), interrogatories were propounded by the lessors to the Insurers (Estop. Exh. Vol. I, pp. 147-149), and interrogatories were propounded by the Insurers to the Grain Company (Estop. Exh. Vol. I, pp. 157-163). These interrogatories, for the most part, were concerned solely with facts involved on the explosion issue.

The Insurers propounded interrogatories to the Grain Company, all of which involved facts relating to the explosion issue. The Grain Company objected to such interrogatories on the ground that the Federal Court lacked jurisdiction "by reason of the prior pendency of a suit by plaintiff against the third party defendants in the Circuit Court of Jackson County, * * *" (Estop. Exh. Vol. I, p. 194), but did not object on the ground that the explosion issue was not actually involved between the Grain Company and the other parties.

Thereafter, before trial, the Grain Company, as well as the lessors and the Insurers, entered into a stipulation of facts (Estop. Exh. Vol. I, pp. 197-201), *all of the facts bearing only upon the explosion issue*, and counsel for the Grain Company, *offered this stipulation of facts in evidence as part of the Grain Company's case* (Estop. Exh. Vol. III, pp. 827-833). In the Missouri case, the Grain Company, through its same counsel, in support of the Grain Company's case, offered in evidence (Tr. 136) a stipulation of facts identical in all material respects to the one offered by it in the Kansas case. The two stipulations of fact are set forth in full in the Appendix, pp. xl to xlv.

Virtually the same witnesses were called in both the Kansas and Missouri cases, on the one hand to establish explosion and, on the other hand, to disprove explosion, or to show the damages alleged to have resulted from the alleged explosions. A list of the identical witnesses testifying in both the Kansas and Missouri cases is set forth in the Appendix, p. xlvi.

As mentioned above, the trial of the case resulted in a verdict for the Grain Company against its lessors and in a finding and judgment in favor of the Insurers on the Third Party proceedings. In connection with the latter ruling, the United States District Court judge made the following finding:

> "Upon the explosion issue, while the Court has indicated that it had some possible doubt as to what its ruling should be, the Court thinks that the clear preponderance of the evidence indicates that there was not an explosion or explosions within the coverage of the policies of insurance at issue in this case. I think all of the credible evidence indicates quite clearly that the loosening of the hopper bottoms, the causing of some of them to fall, was from a pressure occasioned by the swelling of the grain. The mere fact that some of them may have fallen more rapidly than others does not indicate to this Court that there was an explosion or explosions within the purview of those policies. If, peradventure, the Court is in error in that ruling, of course, the Appellate Court may send the matter back for retrial. I realize that where there is substantial evidence upon a factual issue that, of course, the Court should submit the issue to the jury but I believe all of the issues in this case will be more squarely presented if the Court rules and it does now rule that the third party defendants' motion for a directed verdict at the close of all of the evidence should be and it hereby is sustained."

No appeal was taken by the Grain Company from the finding and judgment in favor of the Insurers, and although

notice of appeal therefrom was filed by the lessors, such appeal was subsequently dismissed on motion of such appellants, and the judgment of the United States District Court, in favor of the Insurers, adjudicating that the occurrences were not explosions, became the final judgment. *This was the judgment to which the Supreme Court of Missouri refused to accord full faith and credit.*

The Grain Company, Being the Real Party in Interest, Was the Plaintiff in Fact, If Not in Name in the Third Party Action in Kansas.

In the lease between the Grain Company and its lessors it was provided, in part (Estop. Exh. Vol. VII, p. 2237):

> "If during the term hereof said buildings, machinery and equipment provided by the lessor upon the property herein leased be destroyed or damaged by fire or other casualty to the extent that the same be rendered unfit for occupancy, *the lessor engages to use all the proceeds, if necessary, received from any insurance policy covering such hazard to repair or rebuild buildings or improvements* * * *." (Emphasis supplied.)

The position of the Grain Company with respect to such insurance proceeds is shown in its brief filed in support of request for jury charge, where the Grain Company said (Estop. Exh. Vol. I, p. 52):

> "* * * The purpose of the insurance clause is to require the use of insurance money for repair and restoration—*to impose a duty on the lessor and to charge a particular fund.* * * *" (Emphasis supplied.)

In the same brief the Grain Company said (Estop. Exh. Vol. I, p. 53):

> "The legitimate office of the insurance clause in the lease can be seen as adding and supplementing the covenant to repair—*requiring use of any insurance money,* directing immediate attention to repairs, * * *.

> * * * Although they carry abundant insurance, and plaintiff has urged them to make claim for the proportion of the loss due to explosions, which is covered by the type of insurance carried, they have failed to do so, * * *." (Emphasis supplied.)

In its motion for separate trials (Estop. Exh. Vol I, p. 85) the Grain Company recognized that if it was successful in its Complaint against its lessors, it, the Grain Company would be the real party in interest with respect to the lessors' suit against the forty-eight insurance companies, petitioners here, the Grain Company saying in such motion (Estop. Exh. 85):

> "Disposition of the issues raised by the Complaint and Answers will facilitate disposition of the third party claim because *it will determine whether plaintiff or defendants are the real parties in interest* with regard to the third party complaint." (Emphasis supplied.)

Since the jury returned a verdict in favor of the Grain Company and against its lessors, and judgment was entered thereon, such action, viewed in light of the Grain Company's concession, established that *the Grain Company was at all times during such litigation the real party in interest with respect to the right of recovery in the third party proceedings against the Insurers. The Grain Company was the plaintiff in fact, if not in name, in the third party action.*

The Grain Company, earlier in the proceedings, had propounded interrogatories to its lessors in an attempt to establish with certainty the policies of insurance to which it might lay claim, directly or indirectly, such interrogatories calling for information as to the names of the companies, the amounts of the policies, the coverage of the policies, whether any claim had been filed on account of the explosions, information as to where the copies of the

policies were located and other questions relating to the relationship of officers or directors of Minnesota Avenue, Inc., with any of the insurance companies involved (Estop. Exh. Vol. I, p. 16). The lessors answered these interrogatories and supplied the specific information which enabled the Grain Company to control the disposition of any recovery on these policies. In answers filed by the Grain Company to interrogatories propounded by its lessors, the Grain Company set forth the damages which it claimed were attributable to explosion, such information affording a basis for the Grain Company to avail itself of the insurance proceeds in the event recovery was had for the alleged explosions.

That the lessors shared the views of the Grain Company with respect to the right of the Grain Company to the insurance proceeds is shown in the lessors' answer to the Grain Company's First Amended Complaint, where the lessors, in speaking of their right of recovery against the Insurers said (Estop. Exh. Vol. I, p. 105):

> "* * * then and in that event this answering defendant is entitled to recover judgment against the third party defendants for the same, *for the purpose of paying such proceeds of insurance to the plaintiff (the Grain Company) to the extent of such damages,* if any, that are established by the evidence as having been proximately caused by explosions." (Emphasis and parenthetical explanation supplied.)

Of course, since the Insurers were exonerated in the Kansas case from any liability to the lessors, the Court there finding that the occurrences were not explosions, there was no recovery in favor of the lessors to be paid to the Grain Company under the express terms of the Lease, or to which the Grain Company could make any claim. However, the fact that there was no recovery in favor of the lessors, in no wise altered the fact that, under the express terms of the Lease, under the statement of intention by the Grain

Company and its lessors, the Grain Company was entitled to any insurance proceeds which might have been recovered if the occurrences had been adjudicated to have been explosions.

ARGUMENT.

THE SUPREME COURT OF MISSOURI DEPRIVED PETITIONERS OF THE PRIVILEGES GRANTED BY ARTICLE IV, SECTION 1 OF THE CONSTITUTION OF THE UNITED STATES BY FAILING TO ACCORD FULL FAITH AND CREDIT TO A PRIOR FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, WHICH SAID JUDGMENT FINALLY ADJUDICATED AN ISSUE WHICH, PER SE, CONTROLLED THE OUTCOME OF THE LITIGATION IN THE STATE COURTS OF MISSOURI. A VIOLATION OF THE FULL FAITH AND CREDIT CLAUSE, SUCH AS INVOLVED HERE, HAS BEEN ONE OF THE GROUNDS FREQUENTLY MOVING THIS COURT TO GRANT CERTIORARI.

Reasons for granting the writ.

The decision of the Supreme Court of Missouri has not only deprived petitioners of the rights and privileges of the Full Faith and Credit Clause of the Constitution, but has produced a result in every sense repugnant to justice. This decision says that the same facts, judicially adjudicated not to be explosions in Kansas, are nevertheless, in Missouri, explosions. The situs of the occurrences was in Kansas City, Kansas, on the westerly banks of the Missouri River, and the United States District Court for the District of Kansas finally adjudicated, in an action in which all those now before this Court were parties, that the occurrences in Kansas were not explosions. Yet, the Supreme Court of Missouri, choosing to ignore such prior

adjudication, has allowed relitigation of the same question of fact. As might well be expected, such decision has not only created widespread uncertainty and confusion in both the insurance and grain industries, but the public at large is confronted with the unseemly spectacle of a high court flaunting the prior final judgment of the federal court.

Failure of the Supreme Court of Missouri to accord full faith and credit to the final Kansas judgment was not only a patent error of law, but involves a matter of grave public importance. Admittedly, except for review here of such decision, petitioners will be unjustly compelled to pay almost $1,000,000. If the Supreme Court of Missouri, or indeed, the Supreme Court of any state, without fear of review, can make itself the final arbiter of when and how the Full Faith and Credit Clause shall be given effect, then the entire doctrine of full faith and credit is a travesty.

In a number of decisions this Court has held that it is the final arbiter in cases where the highest court of review of a state has refused to give full faith and credit to the final judgment of a sister state, or of a federal court. This Honorable Court has frequently granted certiorari to review a decision which involves the question as to the application, extent or limitation of the Full Faith and Credit Clause. *Pink* v. *A. A. A. Highway Express*, 314 U. S. 201, 86 L. Ed. 152 (certiorari granted 313 U. S. 555, 85 L. Ed. 1517); *Williams* v. *State of North Carolina*, 317 U. S. 287, 87 L. Ed. 279 (certiorari granted 315 U. S. 795, 86 L. Ed. 1196); *Stoll* v. *Gottlieb*, 305 U. S. 165, 83 L. Ed. 104 (certiorari granted 304, U. S. 554, 82 L. Ed. 1523), the latter case holding that the ruling of the Supreme Court of Illinois, which disregarded decrees of a court of the United States, raised a federal question reviewable under statute providing for review by the Supreme Court of the United States, by certiorari; *Barber* v. *Barber*, 323 U. S. 77, 89 L. Ed. 82; *Pacific Employers Insurance Co.* v.

Industrial Accident Commission of California, 306 U. S. 493, 83 L. Ed. 940 (certiorari granted 305 U. S. 563, 83 L. Ed. 355); *Riley* v. *New York Trust Co.*, 315 U. S. 343, 86 L. Ed. 885 (certiorari granted 313 U. S. 555, 85 L. Ed. 1517); *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 88 L. Ed. 149 (certiorari granted 319 U. S. 734, 87 L. Ed. 1695), holding that where a state court refuses credit to the judgment of a sister state, an asserted federal right is denied, and the sufficiency of the grounds of denial are for the Supreme Court of the United States to decide; *Titus* v. *Wallick*, 306 U. S. 282, 83 L. Ed. 653 (certiorari granted 305 U. S. 585, 83 L. Ed. 370); *Adam* v. *Saenger*, 303 U. S. 59, 82 L. Ed. 649 (certiorari granted 302 U. S. 668, 82 L. Ed. 515).

It is elementary, of course, that the Full Faith and Credit Clause of the Constitution of the United States is now as much applicable to final judgments of a federal court as it is to the final judgments of a state court. *Stoll* v. *Gottlieb*, 305 U. S. 165, 83 L. Ed. 104, 108.

The decision challenged here adjudicates that the occurrences, upon which claim was made, were explosions, yet two other jurists of the highest ability and repute have considered these identical occurrences and have adjudicated that the occurrences were not explosions. The Honorable Arthur J. Mellott, Judge of the United States District Court for the District of Kansas, after a trial lasting almost a full month, in which the same parties were before him, held that the occurrences were not explosions. The Honorable Paul A. Buzard, Judge of the Circuit Court of Jackson County, Missouri, before whom the Missouri action was tried, after a lengthy trial, held that the occurrences were not explosions; moreover, Judge Buzard astutely recognized that the Grain Company had had its day in court in Kansas, and therefore, was forever precluded from relitigating the explosion issue.

Petitioners claimed the benefits of the collateral estoppel arising from the prior Kansas adjudication at the earliest possible moment, having raised the defense of such collateral estoppel in their answer to the Grain Company's complaint in the Missouri case (Tr. 47-57). Petitioners never deviated from this position. In petitioners' motion in the Missouri case for new trial, or, in the alternative, for judgment in their favor notwithstanding the verdict and judgment below (Tr. 1244-1249), petitioners specifically pointed out to the trial court that the failure to hold that the Kansas judgment estopped the Grain Company from relitigating the explosion issue amounted to a failure to give full faith and credit to such prior federal court judgment, in violation of Section 1 of Article IV of the Constitution of the United States (Tr. 1245, 1246, 1247). As indicated in the Statement of the Case above, the Missouri trial court ultimately recognized the effect of the collateral estoppel against the Grain Company arising from the Kansas judgment, and set aside the verdict and judgment below, not only on the ground that the occurrences were not explosions, *but also upon the ground of such collateral estoppel.* Petitioners, having prevailed at that point, had no occasion to invoke the benefits of the Full Faith and Credit Clause again until *after* the Supreme Court of Missouri had reversed the judgment of the trial court, thereby depriving petitioners of the benefits of the collateral estoppel so arising from the Kansas judgment. Again, petitioners invoked such clause in their motion for rehearing directed to the Supreme Court of Missouri (Mo. S. C. Tr. 89), but on October 8, 1956, such court entered its final order denying such motion for rehearing.

We have here the anomalous situation of a Missouri court holding that damage to property located in *Kansas* was caused by explosion in the face of a prior *Kansas* adjudication holding that the *same property* was *not* dam-

aged by explosion. The Full Faith and Credit Clause was designed to obviate just such anomalies. Whether a given train of events involving the same property is or is not an explosion cannot depend on which side of the river one stands. Full faith and credit requires that the Kansas determination, having been first made, is dispositive of the issue.

A.

The Kansas and the Missouri cases arose out of the same occurrences; in each case the insured sought to recover from petitioners upon a policy of insurance affording coverage on property at the same location in Kansas for loss caused by explosion; in each case the right of the insured to recover depended upon whether these particular occurrences were explosions; in the prior final judgment in Kansas, it was adjudicated that the occurrences were not explosions; such final determination of the issue of explosion, under the doctrine of collateral estoppel, was binding upon respondent in the Missouri case.

1.

The Supreme Court of Missouri, in refusing to accord full faith and credit to the Kansas judgment, mistakenly measured the Insurers' rights by an inapplicable standard, and failed to recognize the collateral estoppel arising out of the adjudication of the explosion issue in the Kansas case. The doctrine of collateral estoppel is, of course, recognized by this Court, and is within the purview of the Full Faith and Credit Clause.

It is clear from the opinion of the Supreme Court of Missouri that such court measured the Insurers' rights by the wrong standard. In the opinion, Commissioner Van Osdol said (Appendix, p. xxix):

> "Plaintiff contends the trial court erred in ruling, and defendants contend the trial court correctly ruled, that plaintiff was estopped to relitigate the issue of explosion. *These contentions involve questions governed by principles of the doctrine of res judicata.* * * *" (Emphasis supplied.)

When the Supreme Court of Missouri referred to the doctrine of *res judicata*, it was referring to, and applying the broadest concept of *res adjudicata*, in the sense that a former adjudication is held to be a bar to the relitigation of

the same cause of action between the same parties. This concept is generally referred to as "*direct estoppel*". The court below gave no heed to the Insurers' contentions based on the doctrine of "collateral estoppel", a subsidiary concept or division of the law of former adjudication. *Nowhere in the opinion below is there to be found a reference to the doctrine of collateral estoppel which manifestly governs the issue here involved.*

Of course, there is a major difference between these two concepts. The opinion of the court below indicates that such court patently overlooked or chose to ignore the essential difference between these two concepts, and obviously, such failure was, in large part, responsible for the result reached below.

The difference between these two concepts is well expressed in the *Restatement of the Law of Judgments*, where in the comment concerning Section 45, the following is stated (Restatement of the Law of Judgments, page 176):

> "d. *Direct Estoppel.* Where an issue is actually litigated and determined in an action, the determination is conclusive in any subsequent action between the parties based upon the same cause of action. * * *"

(Restatement of Law of Judgments, p. 175)

> "c. *Collateral Estoppel.* A judgment, whether in favor of the plaintiff or of the defendant, may have a further effect in a subsequent action between the parties on a different claim. The judgment is conclusive as to issues raised in the subsequent action if those issues were actually litigated and determined in the prior action. This effect of the judgment is in the Restatement of this Subject called a collateral estoppel. * * * The term 'collateral estoppel' is used to indicate that the binding effect of a judgment as to matters actually litigated and determined in one action applies to subsequent controversies between the parties involving a different cause of action from that upon which the original judgment was based.* * *"

The court below limited its consideration only to the doctrine of *direct estoppel*, and refused to consider the real issue on which petitioners then and now rely, *i. e.*, *collateral estoppel* preventing the relitigating of the explosion issue. The court below manifestly overlooked that the Insurers were relying on the concept of *collateral estoppel* arising out of the *prior adjudication of a single issue of fact*, and that the Grain Company's interests were so interlaced with those of its lessors in the third party action that the Grain Company was thereafter precluded from relitigating the explosion issue which had been adjudicated in the third party action. Sound reasoning identifies the Grain Company with the interest of its lessors, and therefore, bound by the adjudication in the third party action, whether the Grain Company be regarded as in privity with its lessors, or as the admitted claimant of any recovery made by its lessors, or as the actual proponent of the explosion issue. It cannot be denied that the Grain Company was a party to the Kansas case. It was likewise true that the same forty-eight insurers comprising Underwriters Grain Association, petitioners here, were parties to the Kansas case. No conclusion may be reached other than that the Grain Company actually litigated the explosion issue in a case against petitioners here, and having done so, must be held to be bound by the consequences thereof.

This court, of course, has long recognized the doctrine of *collateral estoppel*. The principle was recently stated in *Partmar Corp.* v. *Paramount Theatres Corp.*, 347 U. S. 89, 98 L. Ed. 532, where it was said, 537:

> "We have often held that under the doctrine of *res judicata* a judgment entered in an action conclusively settles that action as to all matters that were or might have been litigated or adjudged therein. But a prior judgment between the parties has been held to operate as an estoppel in a suit on a cause of action different

> from that forming the basis for the original suit 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' This latter aspect of *res judicata* is the doctrine of collateral estoppel by judgment, established as a procedure for carrying out the public policy of avoiding repetitious litigation."

The doctrine of collateral estoppel is so well established and adhered to in this Court that further elaboration is unnecessary, the doctrine having been recognized and upheld in the following cases: *Cromwell* v. *County of Sac*, 94 U. S. 353, 24 L. Ed. 195; *United States* v. *Moser*, 266 U. S. 326, 69 L. Ed. 195; *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 84 L. Ed. 85; *Commissioner of Internal Revenue* v. *Sunnin*, 333 U. S. 591, 92 L. Ed. 898.

The opinion below, dealing with the question of the former adjudication, discloses that the Supreme Court of Missouri failed to recognize the real significance of the Kansas litigation, because it limited its consideration only to the counterclaims filed by the Insurers in the Kansas case, and the fact that there was no adjudication against the Grain Company on such counterclaims. This is made amply clear by reference to the opinion below where the court said, Appendix, p. xxxiii:

> "* * * A judgment is not generally a bar under the doctrine of res judicata to the further prosecution of claims or demands which were excluded by the court, and, therefore were no part of the verdict and judgment. * * *"

The court below contented itself with the easily reached (but inapplicable) conclusion that since the Insurers' counter-claim against the Grain Company was, in effect, withdrawn, the determination of the explosion issue would not operate to bind the Grain Company. The court thus erroneously oversimplifying the implications of the Kan-

sas adjudication, *thereby missed the real and controlling point completely.* It failed to see that the collateral estoppel arose because of the Grain Company's identification with its lessors in the third party action. Neither the counter-claims, nor the lack of adjudication thereon had anything to do with the Insurers' defense of collateral estoppel arising out of determination of the issue of explosion. Similarly, the burden of our argument here is entirely separate and apart from any considerations flowing from the counter-claims.

In the third party proceedings in the Kansas case, the occurrences in the same elevator were held not to be explosions. The Grain Company, the first party in the Kansas litigation, argued below, and will no doubt argue here, that, since it was not a *nominal* party to the third party proceedings, the adjudication of the explosion issue in such third party proceedings could not bind it in subsequent litigation. However, disregarding matters of mere form, the simple truth is that the Grain Company did litigate the explosion issue in the third party action, and *lost!* After careful analysis and understanding of all of the proceedings in Kansas, the conclusion is inescapable that the Grain Company, by itself injecting the explosion issue in its action against its lessors, by claiming the recovery, if any, to be made by its lessors from the same Insurers, by furnishing its employees as witnesses on the explosion issue, was, in truth, the real party in interest in the third-party action, and was the plaintiff there in fact, if not in name.

In the Kansas case, the Grain Company, appearing as plaintiff in its own action against its lessors, and as *the real party in interest* in the third party action against the Insurers, was the dominant proponent of the explosion issue. We are cognizant of the many decisions which say that a former judgment is not binding upon a *stranger* to such former action. *The Grain Company was no stranger*

to the Kansas case. It was a party to that case, and the determination in the third-party action there that the occurrences were not explosions was the final adjudication of a fact which, under the doctrine of collateral estoppel, forever precluded the Grain Company from bringing the issue of explosion into litigation.

The collateral estoppel arising from the adjudication of the explosion issue was within the purview of the Full Faith and Credit Clause, and entitled to the same treatment as accorded to a former judgment in a case between the same parties on the same cause of action. In principle, this has always been so regarded by this court. In *United States* v. *Silliman*, 167 Fed. 2d, 607, the Circuit Court of Appeals, 3rd Circuit, articulated the rule that the collateral estoppel division of *res judicata* is included within the operation of the Full Faith and Credit Clause, saying, 620:

> "* * * The full faith and credit clause 'compels that controversies be settled so that where a state court has jurisdiction of the parties and subject matter the judgment controls in other states to the same extent as it does in the state where rendered.' Therefore, this decree prevents the litigation of a matter already determined in New York in the courts of another state for *the collateral estoppel division of res judicata is included within that clause.*" (Emphasis supplied.)

In so expressing this doctrine, such court relied on the views expressed by this Court in *Chicago, R. I. & Pacific R. Co.* v. *Schendel*, 270 U. S. 611, 70 L. Ed. 757.

The failure of the court below to discern that collateral estoppel was the principle involved, and such court's failure to measure the Insurers' rights by such doctrine rather than the doctrine of direct estoppel, has allowed the Grain Company, after having lost in Kansas, to relitigate the explosion issue, using the same witnesses and same evi-

dence to accomplish a result plainly contrary to the letter and spirit of the Full Faith and Credit Clause.

2.

The collateral estoppel arising from the Kansas adjudication that the occurrences were not explosions, was binding upon the Grain Company because (a) the Grain Company injected the explosion issue into the Kansas litigation; (b) because the Grain Company claimed the recovery, if any, received by its lessors from the Insurers and was the real, though not nominal, plaintiff in the third party proceedings, and (c) because the Grain Company, in reality, was responsible for the trial of the explosion issue.

The true position of the Grain Company in the Kansas litigation:

The pleadings, proceedings and evidence in the Kansas case establish that the Grain Company, having itself injected the explosion issue into the case, was the real plaintiff in the third party action. This inescapable conclusion in no sense depends upon the Grain Company being a counter-defendant in the counter-claims filed by the Insurers, but is arrived at solely from the Grain Company's peculiar relationship to its lessors, its admitted claim to the recovery, if any, which its lessors might realize from the Insurers, and from the implications arising from the fact that the Grain Company's officers and employees were the fact witnesses offered in support of the explosion issue in such third party proceedings. The dominant presence of the Grain Company as the real plaintiff in the third party action is established when, in comparing the evidence in the Kansas and Missouri cases, it is observed that every witness who testified *pro* explosion in the Kansas case, also testified on behalf of the Grain Company in the Missouri case, and from the fact that the same counsel, appearing for the Grain Company in the Kansas case, as well as

the Missouri case, offered in evidence, as part of the Grain Company's case, a comprehensive stipulation of admitted facts in both cases, *such stipulation having relevance only to the explosion issue* (Appendix, pp. xl to xlv).

The Grain Company's place in the Kansas litigation can best be understood after a consideration of its conduct in that case.

In the Kansas case the Grain Company admittedly was the original proponent of the explosion issue in its own litigation with its lessors. At the time the Grain Company filed its complaint against its lessors, *it* alleged that the occurrences were explosions. No doubt the Grain Company made this allegation with studied care, since, one month after the filing of such case against its lessors, it filed its own action against the same forty-eight insurance companies, petitioners here, in the Circuit Court of Jackson County, Missouri, such suit claiming that the damages suffered by the Grain Company to its grain and to the loss of its earnings were the result of the *same occurrences alleged to be explosions in the Kansas case.*

However, the lessors of the Grain Company did not share the Grain Company's belief that the occurrences were explosions. In the lessors' first answer to the Grain Company's suit in Kansas, the lessors flatly denied that any of the damages claimed by the Grain Company were caused by explosions. Thus, an issue was squarely formed as to whether the occurrences were explosions, and *from that moment on until the final judgment in the case, the explosion issue remained in the Kansas case.*

Long before the Insurers were made third party defendants in the Kansas case, both the Grain Company and its lessors regarded the explosion issue as being in the case. As shown in the Statement of the Case, above, the lessors, shortly after filing their Answers denying explosion, propounded interrogatories to the Grain Company

to elicit information relating to the damages allegedly caused by explosion. The Grain Company did not object to such interrogatories, but willingly, and perhaps with some degree of vindictiveness, answered such interrogatories with a wealth of information relating to damages *which it still maintained were caused by explosion.* (Indeed, the Grain Company, in the Missouri case, readily admitted that one item of approximately $59,000.00 representing wages paid in connection with rehabilitation work was *the same item for which it sought recovery against its lessors in the Kansas case.*

Far from divorcing itself from the explosion issue, the Grain Company took what it no doubt believed to be an opportune step to sequester the recovery, if any, which its lessors might obtain on the insurance policies which petitioners had issued to its lessors. To implement such opportunism, the Grain Company propounded interrogatories to its lessors seeking to "smoke out" the insurance which existed in favor of its lessors and, as is clear from the record, was highly critical of its lessors' failure to press a claim against the Insurers on such policies. Such criticism stemmed from the fact that the Grain Company believed the post-flood occurrences to be explosions, while its lessors patently disagreed.

As the litigation advanced, the lessors assumed an understandable posture in the case; they were on the horns of a dilemma; while they did not believe the occurrences were explosions (and, indeed, had been so advised by experts employed by them), yet with the Grain Company claiming that the occurrences were explosions, the lessors did not dare forego any *possible* recovery on the policies insuring the elevator, no doubt expecting the Grain Company, *as part of its case,* to prove that the occurrences were explosions. Truly, if the Grain Company had successfully maintained the burden of proof on the explosion

issue as alleged in paragraphs 6 and 7 of its original complaint, the lessors would indeed have been derelict in their duties towards those whose financial interests they safeguarded, unless they asserted a claim on the insurance policies, no matter how nebulous, feeble or irresolute. This protective instinct, and nothing more, inspired the third party action against the Insurers. The irresoluteness of the lessors' position as third party plaintiffs is eloquently expressed in the Third Party Complaint itself, where the lessors first alleged (Estop. Exh. Vol. I, p. 69) that the Grain Company had filed its complaint *against them* in which it was claimed that the leased facilities were damaged by reason of explosions, and that the lease obligated the lessors to use all the proceeds from any insurance policy covering such hazard to repair the buildings, and (par. 4; Estop. Exh. Vol. I, p. 70):

> "While defendant, the Minnesota Avenue, Inc., and defendant, The City of Kansas City, Kansas, a municipal corporation, by their separate Answers denied that any of the alleged damage referred to in plaintiff's Complaint was in fact caused by explosion, said defendants nevertheless state that *if said damage or any part of said damage was caused by explosion (as plaintiff alleges) then the third party defendants are severally liable to defendant, the Minnesota Avenue, Inc., and to the defendant, The City of Kansas City, Kansas, a municipal corporation, under and subject to the terms of their respective policies aforesaid for the amount of said damage by explosion.*" (Emphasis supplied.)

Manifestly the lessors did not believe that they had a cause of action for damages resulting from explosion. In light of the information then possessed by the lessors, all they sought to accomplish was to protect themselves, and their right to recover, *if the Grain Company should successfully maintain its burden of proof of the allegations of paragraphs 6 and 7 of the Complaint wherein the Grain Com-*

pany had alleged that the occurrences were explosions. Measuring the position of the lessors at that time, if there was any evidence that the occurrences were explosions, *such evidence had to come from the Grain Company, for the lessors not only had no evidence that the occurrences were explosions, but had been advised precisely to the contrary by their experts.*

Giving effect to substance rather than form, the function of the third party action against the Insurers although nominally brought by the lessors, in reality, was brought for the benefit of the Grain Company, and indeed, was the product of two factors: (a) the Grain Company's criticism of the lessors' failure to press a claim based on explosion, and (b) the Grain Company's manifest desire to establish *itself* as the rightful claimant of any recovery obtained from the Insurers.

So motivated, the lessors, about six months after the commencement of the Kansas action, filed their third party complaint. With strange perversity of position, the Grain Company, after prodding its lessors to press action on the insurance policies, objected to the filing of the third party proceedings. It is not without significance that the Grain Company, when objecting to the filing of the third party complaint, said (Estop. Exh. Vol. I, p. 78):

> "What we fear specifically is that plaintiff here (the Grain Company) may be held to be the real party in interest in the controversy between these defendants (the lessors) and the third party defendant (the Insurers). Thus an adjudication here might be held to be *res judicata* as to our litigation in Missouri against these same insurance companies." (Parenthetical explanation supplied.)

However, despite such contention and despite the implications of a trial of the third party complaint, the United States District Court allowed the filing of the third party

complaint. After trial, the adverse adjudication, so feared by the Grain Company, became a reality.

However, when the finger pointed to the Grain Company as the progenitor of the third party proceedings against the Insurers, the Grain Company, being understandably apprehensive that an adverse adjudication in the Kansas case might be *res judicata* against it in the Missouri case, arising out of the same facts, the Grain Company made abortive efforts to disengage itself from the explosion issue. The record in the Kansas case discloses the mere "lip service" shift in position attempted by the Grain Company. The Grain Company filed a First Amended Complaint, *changed only by eliminating the allegation that its damage was caused by explosion* (Estop. Exh. Vol. I, pp. 92-95). The lessors, however, realistically refused to accede to the Grain Company's effort to disclaim parenthood of the explosion issue. Examination of the Answer of the lessors to the Grain Company's Amended Complaint shows the insistence with which *the lessors recognized that the explosion issue was still in the case* between the Grain Company and themselves. As shown by the record in the Kansas case (Estop. Exh. Vol. I, pp. 96-107) the lessors (still dependent upon the Grain Company's evidence, if any, to prove explosion) recited the statements made under oath by the Grain Company to the interrogatories propounded earlier by the lessors (Estop. Exh. Vol. I, pp. 30-38) showing that the Grain Company had alleged that *the same occurrences were explosions in its Missouri action against the same Insurers*, showing that the lessors still did not believe that the occurrences were explosions, but, paraphrasing the Grain Company's Amended Complaint, alleged that if "alleged action of flood waters upon the grain might have produced forces which could be held to be an explosion," then the lessors claimed to be entitled to recovery under the policies.

The Grain Company, recognizing the danger of a potential finding that the occurrences were not explosions, tried to recede further from the implications of a trial involving the explosion issue. The Grain Company moved for separate trials of the issues framed by the pleadings between it and its lessors, and the issues framed in the third party proceedings, but the United States District Court denied such motion (Estop. Exh. Vol. I, p. 140). Aside from any intentions of the court in such ruling, the Grain Company was thus exposed to the binding effect of an adverse finding on the explosion issue in the consolidated trial.

The litigation was marked by a further shift in the position of the lessors. After the Grain Company had *pro forma* eliminated the allegation of explosion from its complaint, the lessors filed an Amended Third Party Complaint in which they departed from their former position, and for the first time alleged unequivocally that the occurrences were explosions (Estop. Exh. Vol. I, pp. 120-121). At the same time, the lessors filed an Amended Answer to the Amended Complaint of the Grain Company, in which the lessors, for the first time, alleged that *the damage for which the Grain Company sought recovery in its Amended Complaint was a result of explosion.* It is to be observed that the lessors were still refusing to let the Grain Company divorce itself from the explosion issue. There never was an "original" allegation that the *lessors,* (as distinguished from the Grain Company) suffered damage to their elevator caused by explosion, but *the allegation of damages, such as it is, is inescapably tied into the Grain Company's damages (originally alleged to be due to explosion) for which recovery was sought against the lessors.* The claim made under the insurance policies in the Kansas case was always limited to the damages actually claimed by the Grain Company from its lessors, which said damages, first by the Grain Company, and ultimately by the lessors, were pinpointed to the alleged explosions.

It is pertinent to observe that on two occasions the Grain Company tried to fortify its attempted divorce from the explosion issue: (a) when it objected to the third party proceedings, and (b) when it moved for separate trials. However the Grain Company's objections to the third party proceedings were overruled and its motion for separate trials was denied. Whether the trial judge was right or wrong in his rulings, or what the trial judge *intended* by such rulings, is not in issue here; the legal effect of such rulings was to hold the Grain Company in a consolidated trial in which the explosion issue, which the Grain Company had itself injected, was adjudicated adversely to the Grain Company.

Such adverse adjudication of that particular fact raised a collateral estoppel which forever precluded the Grain Company from relitigating the explosion issue.

Any arguments by the Grain Company to the effect that it was not trying the explosion issue in the Kansas case is at once defeated by the facts, for it is no coincidence that the same counsel for the Grain Company, *in both the Kansas and the Missouri cases*, relied on a comprehensive stipulation of facts *bearing only upon the explosion issue*, the stipulation in the Missouri case, in all material respects, being identical with the one offered in the Kansas case. Further, it is no coincidence that the fact witnesses, testifying *pro* explosion in the Kansas case were the key employees of the Grain Company, Paul Bartlett, Jr., *Secretary-Treasurer of the Grain Company;* Emmett Byrd, *Assistant Superintendent of the Grain Company;* Camden W. Riley, *Superintendent of the Grain Company;* and Mitchell B. Shafer, *Weighmaster of the Grain Company.* These same four men testified in the Missouri case. It was no coincidence that the two experts offered to prove explosion in the Kansas case, Dr. Fred Kurata and Mr. L. C. McDonald, were the two witnesses principally relied on by

the Grain Company in the Missouri case, for actually the identical issue was being tried in both cases. The parties relied on virtually the same evidence on both cases. The Insurers in both the Kansas and Missouri cases, to rebut the evidence offered in support of explosion, relied on the evidence of Clayton Hill, Superintendent for Harry Surface Company; George Vaughan, Millwright for Harry Surface Company; Eugene F. Farrell and Max Milner, Milling Experts from Kansas State College.

The trial of the explosion issue in the Missouri case was nothing more than the relitigation of the same issue between the same parties and upon virtually the same evidence. The Grain Company lost in Kansas and hoped for a second chance to litigate the question in Missouri. The trial judge in Missouri after hearing the case, and after considering the implications of the Kansas adjudication, refused to allow the Grain Company to have the benefit of such relitigation. However, the Supreme Court of Missouri, by its decision, ignored such former adjudication and refused to accord full faith and credit to the final determination of the issue of explosion.

The Grain Company as the real plaintiff in the third party action, was precluded from relitigating the explosion issue:

As shown in the Statement of the Case above, the lease between the Grain Company and its lessors was the key to the Grain Company's claim to the proceeds of insurance, if any, which might be recovered in the Kansas case. The lease provided that if the elevator was damaged by casualty, the lessor was obligated to use the proceeds from any insurance covering such hazard to repair the elevator. It is idle for the Grain Company to argue that it was content to rely on the solvency of its lessor, and that its

lessor's right of recovery against the Insurers was a matter of no concern to the Grain Company, for the Grain Company's own statements and conduct show precisely the opposite. The Grain Company (in a brief filed in support of request for jury charge) told the Kansas Court (Estop. Exh. Vol. I, p. 51):

> "* * * The purpose of the insurance clause is to require the use of insurance money for repair and restoration—to impose a positive duty on the lessor and to charge a particular fund. * * *"

As shown in the preceding section, it was only because the Grain Company was insisting that its lessor press a claim on the insurance policies issued by petitioners that the third party action was filed. It cannot be doubted that if the Grain Company had predicated its original suit against its lessors simply upon the ground that the damages to the elevator were caused by flood, the lessors would never have pressed any claim on the insurance policies, since such policies did not cover the peril of flood, and the lessors knew that the occurrences were not explosions; it was only after the Grain Company had so persistently charged that the damage was due to explosion, that the lessors, in order to protect themselves and those whose financial interests they represented, made their irresolute claim on the policies, evidenced by the third party complaint.

That the lessors shared the Grain Company's view that the Grain Company was entitled to the recovery, if any, made on the policies of insurance because of explosion, is shown, without dispute, for the lessors, in their answer to the Grain Company's first amended complaint, in speaking of their right of recovery against the Insurers, said (Est. Exh. Vol. I, p. 105):

> "* * * then and in that event this answering defendant is entitled to recover judgment against the

> third party defendants for the same, *for the purpose of paying such proceeds of insurance to the plaintiff (the Grain Company) to the extent of such damages, if any, that are established by the evidence as having been proximately caused by explosions.* * * *" (Emphasis and parenthetical explanation supplied.)

If any doubt remains about the Grain Company's position with respect to the third party action, such doubt is removed by the Grain Company's own statement of its position found in the motion filed by the Grain Company in the Kansas case for separate trials; in said motion the Grain Company said (Estop. Exh. Vol. 1, p. 85):

> "Disposition of the issues raised by the complaint and answers will facilitate disposition of the third party claim *because it will determine whether plaintiff or defendants are the real parties in interest with regard to the third party complaints.*" (Emphasis supplied.)

It is thus clear that if the Kansas court had granted separate trials, and if, upon the trial of the Grain Company's action against its lessors, the Grain Company prevailed, then the Grain Company, by its own admission, would have been willing to drop its masquerade, and assume its true role as the real party in interest in the third party action against the insurers. What transpired at the Kansas trial did not affect this inherent reality. The issues in the Grain Company's case against its lessors and the issues in the third party proceedings were tried in one consolidated trial. The Grain Company *did prevail* against its lessors, recovering a judgment over $95,000.00. Thus upon the Grain Company's own statement of its position, it was always the real, if not nominal, plaintiff in the third party proceedings against the Insurers. The Grain Company, having thus established that it, and it alone was entitled to the recovery, if any, upon the insurance, would have been entitled to avail itself of a favorable decision on the explosion issue, but at the same time, was bound, for all

time, if the adjudication of the explosion issue was adverse.

The vast body of law treating with the effect of former adjudication, embracing both the doctrine of collateral estoppel and direct estoppel is aimed at terminating litigation. When a litigant has been before the courts and, in a fair trial, has had a chance to litigate a particular fact, the reasoning underlying the law of former adjudication insists that such litigant be precluded from thereafter harassing his adversary, seeking relitigation of the same issue. Public policy demands that there be an end to litigation. The reasoning which underlies this sound public policy generally moves the courts to disregard matters of mere form and to search out and give effect to matters of substance.

We find no decision squarely passing upon the unique state of facts found in the case at bar. The answer is to be found in the sound legal reasoning which underlies all the decisions which, depending on the facts, hold a person bound by a determination of an issue despite his claim that he was not a party "of record" to such judgment. However, since the Grain Company was a party of record in the Kansas case, we need not resort to the lines of decisions which go even further than the facts require here, and hold former adjudications binding on persons who were not formal parties to the prior case. The reasoning underlying such cases demonstrates why, particularly under the facts here, the Grain Company was bound by the Kansas adjudication.

The binding effect of a former adjudication is extended by the law to many situations where failure to so extend such binding effect would plainly allow justice to be defeated, and would permit wholly unjustified relitigation. It has long been the law that persons satisfying the traditional concept of privity are as much bound by the adjudi-

cations in a case as the parties of record themselves. Furthermore, such rule has been liberally extended to include many persons not occupying relationships of strict privity. As said in 30 *American Jurisprudence* in the section on Judgments, p. 957:

> "There is no generally prevailing definition of privity which can be automatically applied to all cases involving the doctrine of *res judicata*. Who are privies requires careful examination into the circumstances of each case as it arises. In general, it may be said that such privity involves a person so identified in interest with another that he represents the same legal right. * * *"

An adjudication is held binding on persons not parties to the record where, under the varying circumstances presented, it is regarded that the interests of the nonparty have been actually and adequately represented by the parties of record. Frequent application of this principle is found in class actions. The rule in this connection is stated in the *Restatement of the Law of Judgments*, Section 86, as follows:

> "A person who is one of a class of persons on whose account action is properly brought or defended in a representative action or defense is bound by and entitled to the benefits of the rules of *res judicata* with reference to the subject matter of the action."

A particularly appropriate example of the application of this rule is found in *Sovereign Camp* v. *Bolin*, 305 U. S. 66, 83 L. Ed. 45. In that case, this Court granted certiorari to the Kansas City Court of Appeals of the State of Missouri to review a ruling which affirmed a judgment of the Circuit Court in favor of certain plaintiffs who sought to recover upon a fraternal benefit certificate. The fraternal society had defended on the ground that the action below was barred by reason of the collateral estoppel arising from a final Nebraska decision

which controlled the issues in Missouri, the Society claiming that the Missouri courts failed to accord full faith and credit to the Nebraska judgment. This Court, after considering the Nebraska judgment, said, p. 50:

> "We hold that the judgment denied full faith and credit to the public acts, records, and judicial proceedings of the State of Nebraska."

This Court observed (p. 52) that in the Nebraska case, a class suit, the Society represented all of its members and "stood in judgment for them," holding further that even though the Nebraska suit had a different object than the instant case, the judgment in the Nebraska case was conclusive upon all the members of the Society with respect to all rights, questions or facts therein determined. While in the case here at bar the Kansas action was not a class action, the principles which moved this Court to uphold the collateral estoppel arising from the Nebraska case have equal persuasion with respect to the question presented in the case at bar.

Persons are also held bound by a former adjudication merely because they participated in the earlier case. This rule is well stated in 30 American Jurisprudence, Judgments, p. 960, as follows:

> "The strict rule that a judgment is operative under the doctrine of *res judicata*, only in regard to parties and privies, is sometimes expanded to include as parties or privies, a person who is not technically a party to a judgment, or in privity, with him, but who is, nevertheless, connected with it by his interest in the prior litigation and by his right to participate therein, at least where such right is actively exercised by the employment of counsel, control of the defense, filing of an answer, payment of expenses or costs of the action, or doing of such other acts as are generally done by parties. * * *"

Without reiterating here the extensive participation exer-

cised by the Grain Company in the Kansas case, it is clear that the Grain Company, by its conduct in the third party action, and by its relationship to the lessors and their third party action, clearly came within the purview of the rule stated above.

All of the logic and sound legal reasoning which make a former adjudication a bar insists that particularly here, where the Grain Company was admittedly a party of record in the Kansas case and the real plaintiff in the third party action, the Grain Company should not be allowed to retain the benefits of a second litigation of the explosion issue as reflected in the erroneous judgment entered by the Court below.

As far as can be observed in the decisions of this Court on questions in this field of law, results have always been reached which override mere matters of form, in order that the end result shall accord with justice. For example, in *Lovejoy* v. *Murray*, 3 Wall. 1, 18 L. Ed. 129, this Court in 1866 held that a bondsman who gave an indemnity bond covering a sheriff, was bound by an adjudication of liability against the sheriff even though the bondsman was not a party to such prior proceeding. This Court said (18 L. Ed. 134):

> "* * * It is also a most obvious principle of justice, that no man ought to be bound by proceedings to which he is a stranger; but the converse of this rule is equally true, that by proceedings to which he was not a stranger, he may well be bound. * * * 'The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party, is, that they are identified with him in interest; and wherever this identity is found to exist, all are alike concluded'."

As we have demonstrated above, the Grain Company was no stranger to the Kansas case. The rule announced in the *Lovejoy* case and the reasons underlying the rule in-

sist that the Grain Company be precluded from retaining benefits attained by relitigating the explosion issue.

In *Stout* v. *Lye*, 103 U. S. 66, 26 L. Ed. 428, for entirely different reasons, this court refused to let one who should have been bound escape the binding effects of a judgment, even though he was not a party to such former action.

Adherence to the same policy can be observed in *Souffront* v. *LaCompagnie des Sucreries de Puerto Rico*, 217 U. S. 475, 54 L. Ed. 846. In its opinion, this Court said (54 L. Ed. 851):

> "* * * The persons for whose benefit, to the knowledge of the court and of all the parties to the record, litigation is being conducted, cannot in a legal sense, be said to be strangers to the cause. The case is within the principle that one who prosecutes or defends a suit in the name of another, to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly, to the knowledge of the opposing party, *is as much bound by the judgment*, and as fully entitled to avail himself of it, as an estoppel against an adversary party, *as he would be if he had been a party to the record.*" (Emphasis supplied.)

Leahy v. *Mercantile Trust Co.*, 296 Mo. 561, 247 S. W. 396, a decision of the Supreme Court of Missouri, itself is of interest here, not only as an expression of that Court, but because of the reasoning supporting such decision. One James Campbell died, leaving a large estate. His will designated the Mercantile Trust Company as executor, and letters testamentary were issued to such executor, The "Harrison Group," interested in the estate, filed an action in the Circuit Court of the City of St. Louis against the executor, in the nature of a will contest. The Harrison Group then petitioned the Probate Court of the City of St. Louis, where the estate was pending, to suspend letters testamentary, and to appoint Leahy as adminis-

trator, *pendente lite*, to take charge of the estate and administer the same during the pendency of the will contest. Leahy was not a party of record to these proceedings. Leahy was appointed as such temporary administrator. The Mercantile Trust Company appealed to the Circuit Court of the City of St. Louis from the order which appointed the temporary administrator and temporarily suspended letters testamentary. Upon such appeal, the reviewing court reversed the order of the Probate Court which had temporarily suspended the letters testamentary. The Harrison Group did not appeal from the ruling of the Circuit Court but Leahy appealed to the Supreme Court of Missouri. Ultimately the Supreme Court of Missouri entered an order dismissing Leahy's appeal. Thereafter Leahy, ousted as temporary administrator, filed a suit against the Mercantile Trust Company seeking to recover the amount of fees which such executor was paid from the estate after administration had been completed. The Trust Company, in its answer averred, *inter alia*, that Leahy was precluded from relitigating the propriety of its appointment as executor by the former adjudication of the Circuit Court sitting in review of the Probate Court. Judgment was entered in favor of the Mercantile Trust Company upon the pleadings, and Leahy appealed to the Supreme Court of Missouri, which latter court, in the opinion reported at 247 S. W. 396, held that Leahy was bound by the former adjudication in the Circuit Court of the City of St. Louis which had restored the executor to its position. Leahy urged that he should not be bound by such former adjudication *because he was not in fact a party to the application for the appointment of a temporary administrator*, such application being made by the Harrison Group, who were the parties of record. The Supreme Court of Missouri, however, had no difficulty in rejecting Leahy's contention and held that the former adjudication of these

facts bound Leahy even though he was not formally a party to the proceedings. The court said, 247 S. W. 404:

> "* * * One does not have to be a party to the record to be estopped by a judgment. If he participates in the trial * * *, then we have *res adjudicata* or estoppel by judgment, just as fully as if he had been a party. His (Leahy) interest was interlaced with Margaret Harrison, *et al.* They sought the suspension of the Mercantile Trust Company as executor of James Campbell and Leahy was interested in that suspension. He fought his fight through Margaret Harrison, *et al.* Margaret Harrison, *et al.*, quit at the judgment of the Circuit Court. As to them the judgment became final in the Circuit Court, and as to them it was *res adjudicata. It is just as much res adjudicata as to Leahy as it is to them.* * * *" (Emphasis and parenthetical explanation supplied.)

In the case at bar the Grain Company's interests were vitally "interlaced" with those of its lessors in the third party action. The Grain Company, as did Leahy, fought its fight through the nominal parties to the proceedings in which the former adjudication was made. If the admonition of the Supreme Court of Missouri is to be regarded as meaningful, the former adjudication of the explosion issue was just as much *res adjudicata* to the Grain Company as, admittedly, it was to the Grain Company's lessors. The reasoning expressed in the *Leahy* case has direct application to the situation presented here.

The present trend of courts is to extend the binding effect of former judgments to those as to whom reason and justice demand application of such estoppel, regardless of whether the situation squarely fits into legal pigeonholes of traditional definition. This flexibility is shown in *Perkins* v. *Benguet Consolidated Mining Co.*, 55 Cal. App. 2d 720, 132 Pac. 2d 70, where the reviewing court said, p. 83:

> "* * * Where a situation arises which so obviously calls for application of the doctrine of *res judicata* as

does the present case, insofar as it concerns impounded dividends, definitions of 'privies' and 'privity' drawn from other situations do not constitute an obstacle to reaching a sound result. In 1 Freeman on Judgments, 5th Ed., page 893, section 409, is the following pertinent observation:

> 'The rule limiting the effect of a judgment to parties and their privies is not to be taken in an absolutely literal sense nor is it without important qualifications and exceptions.
>
> Neither the benefit of judgments on the one side, nor the obligations on the other, are limited exclusively to parties and their privies.' 'The question of who is concluded by a judgment has been obscured by the use of the words "privity" and "privies," which in their precise technical meaning in law are scarcely determinative always of who is and who is not bound by a judgment'."

However, the Court here need not reach so far, since not only was the Grain Company a party of record in the Kansas case, but upon the undisputed facts, it established itself as the only proper claimant of any recovery received from the petitioners under the policies there involved.

The same judicial effort to reach a sound result is observed in *Pelton* v. *Trico Oil Co.* (Tex., Civ. App.), 167 S. W. 2d 625, where the court there said, p. 628:

> "It is a sound principle of law that co-operation or participation of a nonparty with a party of record, in the prosecution or defense of an action, or assumption of the prosecution or defense of a suit, *where the nonparty is pecuniarily interested, directly or indirectly in the result of the suit*, he is in fact, if not in name, a party to the action, and the judgment rendered is conclusive as to him in a subsequent action by or against him by the opposite party." (Emphasis supplied.)

The Grain Company had its full day in court in the Kansas case in an attempt to establish that the occurrences

were explosions. It failed. No sound principle of law or justice countenances a second chance. Yet, the Supreme Court of Missouri, by refusing to accord full faith and credit to the Kansas judgment, gave judicial sanction to the Grain Company's second chance.

3.

The Supreme Court of Missouri failed to observe that the Insurers, in their Answer pleaded fully the facts giving rise to the collateral estoppel and that the Grain Company failed to reply to such Answer. Under Missouri law the Grain Company is deemed to have admitted all of the facts pleaded. The trial judge in the Missouri case, in rendering judgment there in favor of the Insurers, properly predicated such ruling in part upon the affirmative collateral estoppel defense relied on by the Insurers, which, absent any reply, had to be taken as admitted.

Under the applicable Missouri law (Revised Statutes of Missouri, 1949, Section 509.100) (Appendix, p. xl) a plaintiff who fails to reply to an affirmative defense raised in an answer by the defendant, is deemed to have admitted such facts. The Insurers, in the Missouri case, in their answer to the Grain Company's Complaint, set up the affirmative defense in great detail showing the collateral estoppel arising from the final adjudication of the explosion issue in the Kansas case. (See Insurers' Answer, Tr. 47-57.) Supplementing such Answer, the Insurers attached thereto copies menting such Answer, the Insurers attached theerto copies of the pertinent pleadings, order and final judgment in the Kansas case. *The Grain Company filed no reply or denial of the facts so pleaded. Therefore, under Missouri law, the facts of such prior final adjudication stood admitted.* When the trial judge in the Missouri case finally set aside the verdict and judgment in favor of the Grain Company, and entered judgment in favor of the Insurers, he predi-

cated such ruling, in part, upon the affirmative defense so raised by the Insurers in their Answer, saying (Tr. 1249):

> "Third: It has previously been judicially determined that the very occurrences in the case at bar were not explosions, and therefore plaintiff is estopped from relitigating that question."

The Supreme Court of Missouri overlooked or ignored that this critical finding of the trial judge was properly made under Missouri law since the Grain Company had failed to reply to, or deny the affirmative defense so pleaded by the Insurers.

The Supreme Court of Missouri in the case here, ignored its own rulings in *McIntosh* v. *Foulke*, 360 Mo. 481, 228 S. W. 2d 757, a case parallel in all respects to the pleading aspect presented here, where that court said, p. 761:

> "The plea of *res adjudicata* in Foulke's answer does not raise an issue of fact. It raises only the defense of *res adjudicata*. The pleadings, stipulation and judgment in case No. 9223 are set out verbatim in the answer. *There is no reply in this case and those well pleaded res adjudicata matters stand undenied. There is here no issue respecting them. Those allegations of the answer must be taken as true. 'They are contained in a pleading which required a responsive pleading and stand admitted if not denied in such responsive pleading.* Civil Code of Missouri, 1943, page 353, Mo. R. S. A., §§ 847.32, 847.41, 847.58." (Emphasis supplied.)

Fair Mercantile Co. v. *Union-May-Stern Co.*, 359 Mo. 385, 221 S. W. 2d 751, 754, and *Leahy* v. *The Mercantile Trust Co.*, 296 Mo. 561, 247 S. W. 396, are to like effect.

Manifestly, aside from the basic error committed by the Supreme Court of Missouri in its treatment of the collateral estoppel defense, such error was aggravated by the failure of such court to observe that the Grain Company,

in the eyes of Missouri law, had admitted the former adjudication of the explosion issue. The court below, the same as the trial court should have recognized that the Grain Company, having admitted the facts of the prior adjudication, was precluded from relitigating the explosion issue, and should have refused to entertain the appeal which again challenged the explosion issue.

4.

To avoid the collateral estoppel arising from the Kansas adjudication, the Grain Company could have prosecuted an appeal therefrom in its own name or through its lessors; the Insurers' contentions here are not affected by any argument by the Grain Company grounded on alleged lack of right of appeal.

The Grain Company, on the appeal below, endeavored to evade the impact of the former Kansas adjudication by urging that it had no right to appeal therefrom. The Supreme Court of Missouri readily seized upon this argument, saying (Appendix xxxiv):

> "* * * as we see it, there was no judgment entered adverse to plaintiff from which plaintiff could have perfected an appeal. * * *"

The court below was wrong. Whether that court "saw" it or not, the Kansas judgment in the third party action was one from which the Grain Company, either in its own name, or in the names of its lessors, could have perfected an appeal.

The Grain Company's lessors did file a notice of appeal from the final adjudication of the third party action in Kansas, but such appeal was voluntarily dismissed. The Grain Company itself filed a notice of appeal from the judgment in its favor against its lessors, on the theory that it was entitled to a larger recovery than the amount awarded by the verdict, but such appeal was abandoned.

There is no merit in the Grain Company's contention that the former adjudication in the third party action in Kansas lacked binding effect upon it, the Grain Company, because of the alleged lack of right of appeal. Actually, the Grain Company, if it intended to challenge the collateral estoppel arising from the Kansas adjudication, could have done so by squarely facing such fact and by prosecuting an appeal to the Court of Appeals. The Grain Company could have accomplished such appeal in one of two methods: *first*, since the Grain Company's lessors, in filing the third party action, were merely "conduits" for any recovery to be had against the Insurers, in that proceeding, the Grain Company, being the party claiming the recovery, and the real party in interest, could have prosecuted such appeal from the final adjudication in the third party action, either in its own name, or, if it still chose to adhere to the fictional alignment of parties, could have prosecuted such appeal in the names of its lessors; *secondly*, since the explosion issue (essentially the basis of the Grain Company's claim for damages) had been determined adversely to it, the Grain Company, in its own appeal from the verdict and judgment rendered *in its action against its lessors*, could have challenged, not only the amount of the verdict and judgment, but could have also challenged the adverse adjudication of the explosion issue.

This Court has long recognized that a successful litigant may nevertheless appeal from the judgment in its favor if such litigant is dissatisfied with any particular finding which might be the basis for a collateral estoppel in some future litigation. In this connection it is of interest to observe the footnote found in *Partmar Corp.* v. *Paramount Theatres Corp.*, 347 U. S. 89, 98 L. Ed. 532, at 541, where the following is noted:

"While Partmar did not appeal, it might have. * * *"

The Grain Company will, no doubt, argue that under the

theory of its own case against its lessors, it was immaterial whether the damages for which it sought recovery were the result of explosion or flood. However, we submit that under any realistic view of the case, the explosion issue, originally injected by the Grain Company into its own case against its lessors, always remained in such case. If the Grain Company chose to ignore this legal implication, it did so only at its peril; and having elected not to challenge the adverse finding on such explosion issue, the Grain Company certainly cannot now be heard to say that the collateral estoppel lacks binding force against it, merely because the Grain Company elected not to appeal therefrom.

The views expressed by this Court in the *Partmar* case further support our contention here that the Grain Company's allegation that it had no right of appeal is without merit, particularly when its relationship to the third party action is considered. As to the adverse finding in the third party action, the Grain Company, in reality stood in the shoes of its lessors, and only at its peril, could allow such adjudication to go unchallenged. Since all of the issues were tried in a consolidated trial, to which the Grain Company was admittedly a party, the Grain Company, if dissatisfied, should have appealed from such adverse adjudication *particularly since it knew that the Insurers intended to rely upon such adjudication as a bar to the Grain Company's action against the Insurers in Missouri.* The position of the Insurers on this point was made amply clear to the Grain Company, as appears from the proceedings in the Kansas case. During argument at the trial the Insurers' counsel made the following statement (Estop. Exh. Vol. VI, p. 1818):

> "Mr. Clausen: I think now more than ever before because I think that Mr. Jones has definitely gone into the explosion—or alleged explosion issue. Now he has gone into it. He at first said he wasn't going to but

he has gone into this thing, cross-examining the witnesses about it. I mean why if the explosion issue is determined here, why shouldn't that end it so far as that phase of the case is concerned. I mean why should that issue have to be tried some place else. He brought it in.

* * * * *

(Estop. Exh. Vol. VI, p. 1820):

"Mr. Clausen: I certainly think you are bound if this issue of explosion is once and for all determined here, everybody being parties to the case that you can't re-litigate that in Jackson County, Missouri. I think you are bound by way of estoppel anyway, and furthermore I think the Court has the right under our cross-claim for declaratory judgment to enter a declaratory judgment to the effect that the policies issued to the grain company, Hart-Bartlett-Sturtevant Grain Company, well say, in other words, declaration of non-liability on the ground that no explosion occurred, and my view is that you can't have a full and thorough trial on the issue of explosion here and try it over again in Jackson County, Missouri. It doesn't seem to make sense to me.

(Estop. Exh. Vol. VI, p. 1822):

"Mr. Clausen: Well, if Your Honor please, I don't see how in the world you could have a situation whereby it would be an explosion in Missouri and it would not be an explosion here. Now there has been a very thorough trial on that issue, counsel for the grain company cross-examining the experts at length and being perfectly free to put on testimony if they see fit to do so, and I just can't see why in the world an issue of that kind has to be tried with the possibility of a result being obtained in one state different from the result in another state."

That the Grain Company's lessors, during the same argument, regarded that the Grain Company was still involved in the explosion issue in the third party action, aside from

any questions relating to the counterclaims which are not material here, is made clear from the statement of the lessors' counsel (Estop. Exh. Vol. VI, p. 1831):

> "Mr. Gates: In fairness so there will be no surprise about the matter, before this matter is finally concluded, Your Honor will recall, and I would like to address myself to the Court on that question after the recess, that in the pleadings we say that whatever is recovered by explosion in this case should go to the plaintiff so the plaintiff is still involved in the question of explosion, * * * ."

The Grain Company's lessors, of course, had a right to appeal from the adverse finding on the explosion issue in the third party action. Similarly, the Grain Company, if dissatisfied with the court's ruling on the issue of explosion, had the right to appeal; having failed to appeal, the Grain Company is precluded co-extensively with its lessors from relitigating this issue.

CONCLUSION.

In light of all the foregoing, we respectfully submit that the decision of the Supreme Court of Missouri has unjustly deprived petitioners of the rights and privileges accorded them under the Full Faith and Credit Clause of the Constitution of the United States. By refusing to recognize that the final judgment of the United States District Court for the District of Kansas estopped the Grain Company from ever relitigating the explosion issue, the court below has manifestly done violence to the letter and spirit of the Full Faith and Credit Clause. It is doubtful whether a more harsh or unjust result could ever be reached than the one observed in the situation here, where the same Insurers, after full and fair trial in Kansas where the property was located, were exonerated from liability, and

were similarly exonerated by the trial court in Missouri because the occurrences were not explosions, but where such exoneration was repudiated by the act of a reviewing court which simply refused to accord full faith and credit to the final judgment in a case where the Grain Company had already had a fair chance to litigate this issue and had lost.

For the reasons hereinabove set forth, we respectfully submit that this Court should grant to the petitioners its Writ of Certiorari, and that upon a full hearing of this cause upon the return of such Writ, the judgment of the Supreme Court of Missouri should be reversed, with directions to reinstate the judgment in favor of petitioners entered there below by the Circuit Court of Jackson County, Missouri.

Respectfully submitted,

DONALD N. CLAUSEN,
HERBERT W. HIRSH,
WILLIAM S. HOGSETT,
Counsel for Petitioners.

CLAUSEN, HIRSH & MILLER,
135 So. La Salle St.,
Chicago, Ill.,

HENRY DEPPING,
1200 Waltower Building,
Kansas City, Missouri,

HOGSETT, HOUTS, JAMES, RANDALL & HOGSETT,
906 Grand Ave.,
Kansas City, Missouri,
Of Counsel.

APPENDIX.

IN THE SUPREME COURT OF MISSOURI,
Division Number One,
April Session, 1956.

HART-BARTLETT-STURTEVANT GRAIN COMPANY, a Corporation,
Plaintiff-Appellant,
vs.
AETNA INSURANCE COMPANY, ET AL.,
Defendants-Respondents.
} No. 44,944.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY.
Honorable Paul A. Buzard, Judge.

This is an action on three certificates of insurance issued to plaintiff, the lessee-operator of the River-Rail Elevator located in Kansas City, Kansas. The certificates were issued by Underwriters Grain Association for and on behalf of the forty-eight defendant-respondent insurance companies which participated in the coverage for loss of grains and loss due to interruption of business, the measure of recovery for loss due to interruption of business being the directly resulting reduction of gross earnings. The certificate insuring the grain, contents of the elevator, was in the provisional amount of $5,000,000. Plaintiff sought recovery on this certificate in Count I of its petition. The coverage for loss of earnings was in two certificates, each in the amount of $342,000—(1) covering reduction in gross earnings for such length of time as would be required to rebuild, repair or replace such part of the elevator facilities as might become damaged or destroyed commencing

with the date of damage or destruction, and (2) covering reduction of gross earnings for such length of time as would be required to resume normal operations commencing with the date of restoration. Plaintiff declared on these certificates in Count II of its petition. The three certificates contained identical extended coverage endorsements by which, for an additional premium, coverage was extended to include direct loss by "*explosion.*"

The trial court submitted the issues of plaintiff's case to the jury. One decisive supporting issue was whether plaintiff's losses were due to explosion, or explosions. The jury found for the plaintiff, assessing its whole loss, with interest, in the total amount of $769,522.74, however, the trial court sustained defendants' motion for judgment in accordance with their motion for a directed verdict, set aside the verdict and judgment for plaintiff, and entered judgment for defendants, but overruled defendants' motion for a new trial. The trial court in sustaining defendants' motion for judgment specified the grounds: (1) the evidence conclusively shows that all of plaintiff's loss was caused by flood (a hazard not insured against), not by any explosion; (2) there is no evidence on which a jury could base a verdict for plaintiff on the explosion issue without resorting to guesswork, speculation, conjecture and surmise; and (3) it has previously been judicially determined that the very occurrences in the case at bar were not explosions, and therefore plaintiff is estopped from relitigating that question. Plaintiff has appealed.

The River-Rail Elevator is owned by the City of Kansas City, Kansas. It is located about a thousand feet from the Missouri River bank in the public levee area known as the Fairfax District, and is connected to a public wharf by a gallery with grain conveyor so that grain may be received and delivered from and to barges. It is also served by railroads and trucks.

The structure of the elevator consists of a headhouse (containing much of the elevator-operating machinery and bins, including at least one "dryer bin" at the basement level), and of two batteries of round and interstice or "star" bins, one battery consisting of ninety-five bins and the other of eighty-eight. The round bins each have an inside diameter of nineteen feet and a capacity of 24,400 bushels of grain. The interstice bins (comprising the spaces between the exterior walls of round bins) each has a capacity of 5,500 bushels. The bins are approximately one hundred five feet in height with walls of concrete six inches thick. The whole of the two batteries of bins is surmounted by a one-story structure called the "Texas floor." A relatively small, square aperture in the top of each and all of the bins of both batteries opens through the floor of the Texas floor. The bottoms of the bins are at the approximate ground level and constitute the ceiling of the basement of the elevator structure. July 13, 1951, all of the round and interstice bins, except nine, contained grain in some quantity. The grains were wheat, corn, and grain sorghums.

A "draw-off" hole five feet in diameter is located in the center of the base or bottom (concrete "slab" one foot thick) of each bin. The slab is "hoppered" in a thirty-six degree slope down to the "draw-off" hole. This conical upper side of each slab bin-base is called the "concrete hopper." Octagonal "metal hopper bottoms" are fixed below to receive grain passing through the holes in the concrete hoppers. The hopper bottoms are attached to the concrete on the under side of the base of each bin. The hopper bottoms are "funneled" down at various angles and are connected with elongated rectangular metal "draw-off" spouts angling off at various degrees, through which, by opening slides or gates controlled by ratchets, grain may be permitted to flow from the bins

through the holes in the concrete hoppers and on down through the hopper bottoms and connected spouts onto belt conveyors. The hopper bottoms of all of the forty-three bins with which we are directly concerned are alike in shape and size, except one—the rectangular metal hopper bottom of a dryer bin—this metal bottom is bolted directly to the under side of the concrete base of the bin.

Friday, July 13, 1951, the flooding waters of the Kaw River inundated areas of the industrial districts of Kansas City, Kansas, and in the late afternoon of July 14th, the waters broke through the river levee and inundated the area wherein the elevator is located. During the night of July 14th, waters came into the basement of the elevator, flooding everything therein, including the spouts and hopper bottoms, and rose until the waters had reached a level of "slightly more than two feet" within the concrete hoppers of all of the bins. On the following day, July 15th, the waters began receding from the pavement and ground in the elevator area, but the basement of the elevator remained filled with water. Limited pumping-out operations were commenced on Monday, July 16th. The grains in the concrete hoppers had been wetted by the floods, however, and in the morning of July 17th grain was noticed on top of the water in the basement—it was ascertained that the hopper bottoms ("tanks") of some of the round and interstice bins were "down," permitting quantities of grain to come down through the five-foot draw-off holes into the water.

Each of the octagonally-shaped metal hopper bottoms had been held in place against the under side of the "slab" bottom of a bin by sixteen "clips,"—strips of low-carbon hot-rolled ductile steel, one-fourth inch thick, two inches wide, and six inches long; however, the contact between the metallic hopper bottoms and the slab was not airtight, watertight, or gas tight. The sixteen clips had been fixed

at only approximately equal intervals around the periphery of the draw-off hole in the base of a bin. Each of the clips had been fixed by a nut with washer to a five-eighths-inch bolt embedded in the concrete of the bin-base, the bolt passing through the clip two inches from one end, and the other end ("moment arm") of each and all of the sixteen clips of each bin lay under and supported the 2″ by 1½″ angle-iron flange (3/16″ thick) riveted to the top of the sheet metal of each hopper bottom.

There was evidence that forty-two of the hopper bottoms of the round and interstice bins which had contained grain had been completely detached or expelled by some force or forces occurring after the inundation and partial recession of the flood waters; the draw-off spouts were bent or crushed and bracing hangers pulled or jerked and detached. And a corner of the rectangular hopper bottom of the dryer bin had become fissured or ruptured—the hopper bottom of the dryer bin had a "split" down one corner, "I would say approximately 18 inches. * * * I would say it was between 2½ and 3 inches wide at the widest point. Of course, it was narrowed down at each end." These occurrences had permitted large quantities of grain to pass down into the water in the basement.

It was and is plaintiff's theory that the wet grain within the hopper bottoms and bases of the bins expanded, and the expansion of the grain with its ensuing pressure was augmented by the generation of gases with increasing pressure resulting in the sudden and violent expulsion of the hopper bottoms; but, that, whatever occasioned the pressure in the bases of the bins, the hopper bottoms of the forty-two bins were displaced as a result of high-pressure force or forces, and that such expulsion of these hopper bottoms (and the splitting or rupture of the metal bottom of the dryer bin) and resulting loss of grain and of gross earnings were due to explosion within the meaning

of the word "explosion," as used in the extended-explosion-coverage endorsements.

On the other hand, it was the theory of defendants (respondents-insurers) that none of plaintiff's damage or loss was caused by explosion. Defendants contended, and now contend, that the only reasonable conclusion which may be arrived at from the evidence is that the disengagements of the hopper bottoms were due to the slow and gradual swelling of the grain; that the grain, having absorbed the floodwaters, had taken on a slowly-increasing swelling and pressure, which pressure, together with the weight of the grain, caused the metal clips supporting the hopper bottoms to bend slowly, gradually disengaging the hopper bottoms and allowing them and the grain to fall by the force of gravity; and that the same slow and gradual swelling and pressure similarly caused the split in the hopper bottom of the dryer bin. Defendants assert that no substantial evidence tended to support a conclusion that plaintiff's losses were due to explosion; indeed, defendants say that "uncontradicted and undisputed evidence" is conclusive in demonstrating that the occurrences were not explosions.

An explosion has been defined as "a violent bursting or expansion, with noise, following the sudden production of great pressure, as in the case of explosives, *or a sudden release of pressure*, as in the disruption of a steam boiler; * * *." (Our italics.) Webster's New International Dictionary, 2d Ed., p. 898. *American Paper Products Co.* v. *Continental Ins. Co.*, 208 Mo. App. 87, 225 S. W. 1029 (writ of certiorari quashed in *Continental Ins. Co.* v. *Reynolds*, 290 Mo. 362, 235 S. W. 88), dealt with a clause excluding coverage of the hazard of "explosion." A waterhammer had blown off the cap of a "hot-well." Plaintiff in that case would have had the meaning of the term "explosion" limited to those occurrences caused by combustion or fire.

Of course, an explosion is frequently caused by combustion, but not necessarily so. The term is to be given its ordinary and accepted meaning. In *St. Louis Gaslight Co.* v. *American Fire Ins. Co. of Philadelphia,* 33 Mo. App. 348, the reviewing court, quoting Webster, spoke of an explosion as a "*sudden bursting with noise.*" The witnesses had assumed the term "explosion" meant a rending force caused by the instantaneous and violent expansion of the mixture of gas and air, distinguishable from a mere deflagration of the gas. In *Commercial Union Fire Ins. Co. of New York* v. *Bank of Georgia,* 5 Cir., 197 F. 2d 455, a waterhammer ruptured a fire hydrant. The occurrence was held an explosion within the purview of a policy insuring against damage by explosion. It was said that an explosion is a rapid, sudden, and violent expansion of air or relinquishment of energy, causing a rupture and accompanied by a loud noise, not necessarily extremely loud. Perhaps the principal cause of explosions is fire, but they may be produced without the aid of fire. A flywheel may explode from excessive speed. A severe frost may cause trees to explode. The occurrence constituting an explosion within the meaning of the extended-coverage provision of an insurance policy must be determined from the language of a policy, the ordinary uses of the word, the common experience of men, and their general notions in matters of this sort. And see *L. L. Olds Seed Co.* v. *Commercial Union Assurance Co.,* 7 Cir., 179 F. 2d 472, wherein water from a break 2½" in length and ¼" wide along a 2" water pipe due to waterhammer damaged merchandise in insured's basement. It was said the word "explosion" is not one that lends itself to a precise definition. *General characteristics may be described, but the exact facts which constitute what we call an explosion are not susceptible of such statement as would always distinguish such an occurrence* (*Hartford Fire Ins. Co.* v. *Empire*

Coal Min. Co., 8 Cir., 30 F. 2d 794). See also *Lever Bros* v. *Atlas Assur. Co., Ltd.*, 7 Cir., 131 F. 2d 770 (the theory of insured was that water at the bottom of a cottonseed-oil tank had become superheated and converted into steam, resulting in an explosion); *Bower* v. *Aetna Ins. Co.*, D.C.N.D. Tex., 54 F. Supp. 897 (in the absence of insured, water in the hot-water-heating system of insured's house froze, and in the process of freezing expanded so as to explode, or burst the pipes, with resultant water damage); *Crombie & Co., Inc.* v. *Employers' Fire Ins. Co. of Boston*, Tex. Civ. App., 250 S. W. 2d 472 (the sudden emission of refrigerating ammonia through a valve packing; it was thought the evidence supported the finding of explosion, "though the intensity or degree was much less than in great eruptions we often think about, but nevertheless an explosion"); 35 C. J. S., Explosion, pp. 215-216; and Vol. 15A, Words and Phrases, Perm. Ed., Explosion, pp. 478, *et seq.*

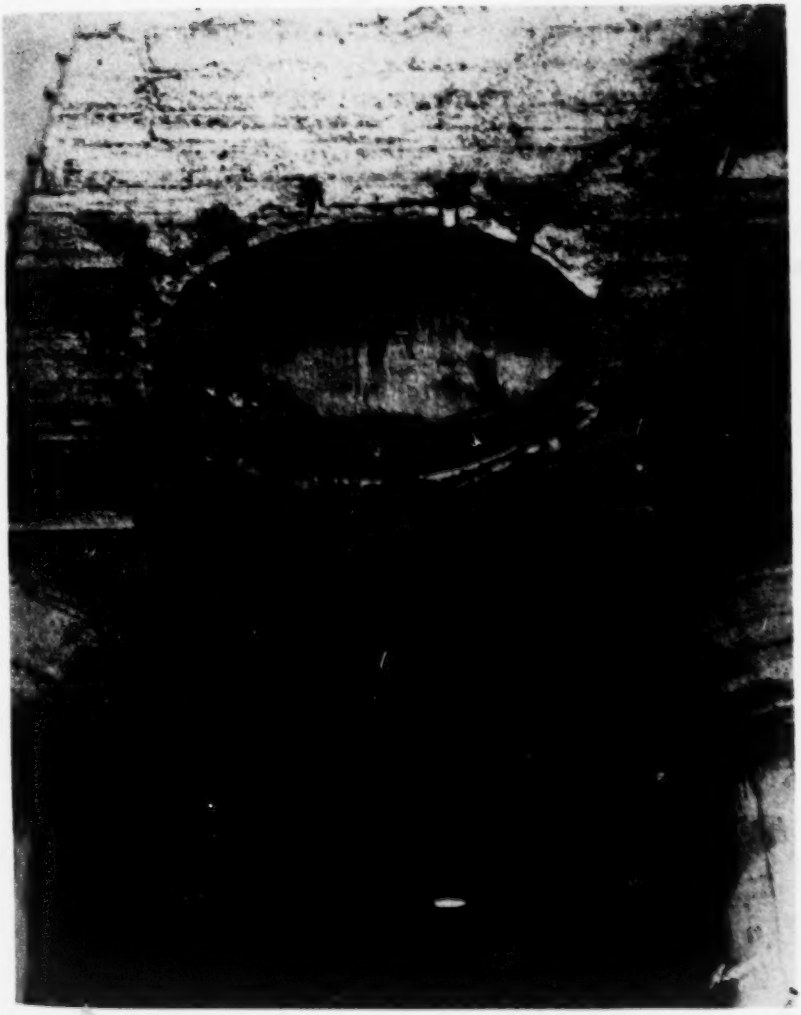
We shall consider the evidence pertinent to the issue of explosion from a standpoint most favorable to plaintiff.

There was evidence that in the morning of Tuesday, July 17th, grain was noticed on top of the water in the elevator basement. Plaintiff's grain mixer, Byrd, and weighmaster, Shafer, went to the Texas floor to make soundings. A sounding is accomplished by lowering a measuring tape with weighted end down into a bin. The soundings showed there was definitely grain in the basement. While Byrd and Shafer were making soundings they heard noises. They were not sure where the noises came from. Byrd testified the noises were "all similar," except the last one, which was much louder. The sounds heard came from different parts of the elevator. When Byrd and Shafer came directly above Bin 101, which contained 24,006 bushels of corn, they heard a noise. It sounded more like "you'd hit something real hard, like

a drum. But there was a vibration of the floor that we were standing on * * *." The last noise—the one from Bin 101—was a "sudden noise." Shafer described the noise as being "like a metal barrel that had been in the sun, that had a sudden expansion of the barrel, with a sharp click to it." It was a sharp noise, "very sharp." "There was vibration there." The noise was like pushing the bottom of a dishpan in and out. The witnesses immediately went down to the ground level, moved their automobiles from the vicinity of the elevator, and thrust a pole through the basement window beneath Bin 101. There was dust floating on the water, and "I touched grain. The grain was right up against the ceiling." There was also some testimony that when those "tanks went out, why that broke some of the (basement) windows and closed some of the (basement) windows (which were open)."

A consulting mechanical engineer, witness for plaintiff, testified that photographs of the bottoms of bins from which the metal hopper bottoms had been detached or expelled disclosed that the metal clips, although they had not been uniformly set around the peripheries of the five-foot holes, seemed nevertheless to have been quite uniformly bent down. (See Plaintiff's Exhibit 65, reproduced herewith.) "* * * it appeared that the hoppers had been expelled directly down without shifting to one side or the other, as they left the slab, and from that it was one of the things that influenced me to believe that the hoppers must have been forced off quite rapidly or explosively, because that is characteristic of the forces that remove it. In other words, there is two forces that set that hopper in motion, or rather that have to be overcome before the hopper will leave that. One is the restraint on the clips themselves. In other words, the things that hold it, and

PLAINTIFF'S EXHIBIT 65.



the other thing is the force that has to give it the engery to move." The witness also spoke of the way several of the "draw-off" spouts were crumpled or buckled. (See Plaintiff's Exhibit 61, reproduced herewith.) He said "the angles appear to substantiate the fact that they went directly down * * *."

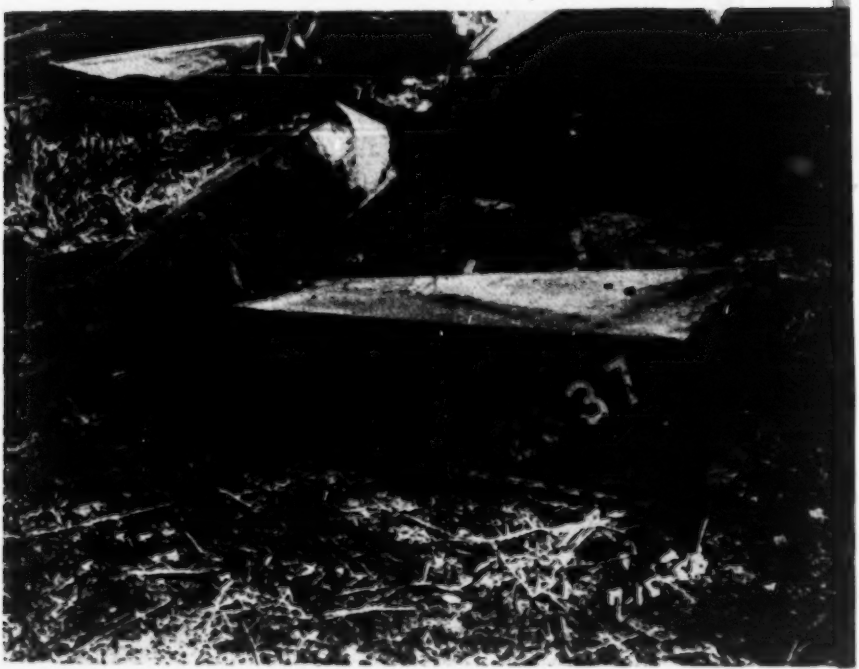
Experiments tended to demonstrate, and a witness for defendants testified, the clips of "bendable," ductile steel would bend back and forth several times before they would break. One shock or one steady push would not break them. They would bend "no matter how fast that one shock was." A witness for plaintiff testified that tests (subjecting steel of like ductile quality as the metal of the clips to increasing pressure) showed that, after the maximum strength of the metal was reached, it "bent with a jerk. * * * a sharp, snapping sound."

All expert witnesses testified that grain expands when wet. Expanding grain when contained exerts great pressure. If the pressure is partially eased, the mass of wet grain increases and the pressure builds up again. One of plaintiff's experts testified that the swelling is rapid for the first twenty hours, then the expansion slows up, and at the end of fifty hours there is no further swelling.

An expert testified an experiment demonstrated a clip of mild, low-carbon steel would begin to bend when subjected to pressure of 1000-1100 pounds, and upon continued and increased pressure "somewhat greater than 2000 pounds the clip would bend to the point of maximum strength, at which time the clip would completely yield. The witness was of the opinion that the expansion of the wet grain with its pent-up pressure "deformed these clips to a certain point," after which the continued expansion forced the clips through their maximum strength—"that state of metastable equilibrium"; they then suddenly failed; and

the "hopper bottoms must have expelled rapidly." It was not just a question of merely dropping off, but of being expelled by these tremendous pressures within. (It was said it is not to be assumed that the weight of grain in a bin bore down entirely on the hopper bottom or on the bin-base.

PLAINTIFF'S EXHIBIT 61.



The grains in contact or friction between grains and with sidewalls have a tendency to "arch or bridge" in accordance with the generally accepted Janssen's Formula.) A witness for defendants testified that one clip would support approximately 540 pounds before it surpassed the yield point, and the maximum strength would be 950-970 pounds for one clip.

Expert witnesses also explained the anaerobic process of fermentation which starts when grain is under water. In this process, when the grain begins to ferment, gases are generated—carbon dioxide and hydrogen. One hundred pounds of wheat could liberate 16.8 gallons of gas in three days, when submerged in distilled water at a temperature of 86 degrees. These gases are capable of exerting great pressure. The hydrogen element makes the mixture inflammable when mixed with oxygen, although it is purely conjectural that such a gas mixture could have been ignited under the conditions obtaining at the time of the instant questioned occurrences.

A witness for defendants testified experiments had shown that wheat soaked in water for seven days imbibed water to the extent of 44.4 percent, corn 41.0 percent, and sorghum 35.4 percent. With respect to the generation of gases, an experiment conducted by the witness showed the appearance of gas eighteen hours after the gain was soaked in water—the production of gas was rather low until thirty hours had elapsed, after which gas was evolved at an ever-increasing rate. The experiment was conducted up to "72 hours, three days." This witness, however, was of the opinion that the gases produced in the bin bottoms of the River-Rail elevator had no effect "on the forcing-off of the hopper bottoms," for the reason, he said, wet grain is quite permeable to gases, and the gas production during the time of the immersion, as well as for sometime afterward, was at a considerably lower rate than the amount

of gas which could permeate or move and become diffused through the wet columns of grain in the bins. Yet there was evidence that soaked grain "mushes down," and thus the interseed spaces that ordinarily would permit gas to escape would be greatly reduced. And the witness had reported an experiment indicating that the initial wetting of wheat when trapped air was removed over a period of forty-five minutes caused an increase of volume from 40 to 48 cubic centimeters; after soaking for thirty hours the volume rose to 59 cubic centimeters; and after seventy-two hours a volume limit of 69 cubic centimeters appeared to have been reached. An experiment treated with wet grains contained in three glass test tubes. Thirty-six hours after the wetting the kernels were flattened and distorted. The grain in a tube containing corn expanded to the extent of pressure that it broke the glass. The rubber stoppers of the other two tubes were forced off by the expansion.

Except in respects immaterial here, insurers' policies did not limit the coverage for "explosion" to explosions by ignition or combustion or expansion of gas, or to any explosion due to any particular cause. We therefore consider the coverage contemplated any explosion within the meaning of the term as commonly accepted. See the authorities cited *supra* treating with the meaning of the term "explosion."

In view of the evidence in this case that when confined pressure due to imbibition is partially eased, the mass of wet grain will expand and build up pressure again, we do not wish to say as a matter of law that a slight initial easing or pressing, if so, of the hopper bottoms away from the slab means that any or all of the forty-three occurrences could not culminate in sudden releases of pressure which could be said to be explosions as the term "explosion" is ordinarily understood.

There was evidence of conditions potential to the evolving of gas by an anaerobic fermentation. But, whether or not there was substantial evidence that high-pressure gas evolved and whether or not such gas, by ignition or expansion, caused or helped to cause the detachment of the hopper bottoms, there is no dispute between the parties or disagreement between their respective witnesses that grain when wetted expands and that expanding grain when confined has great pressure force. Defendants have said in their brief, "Both the Grain Company and the insurers are in agreement that swelling grain exerts tremendous pressure on any container in which it is held." Plaintiff had only the burden of proving there was an explosion. Plaintiff did not have any burden of proving in what particular way the explosion was caused. *Hartford Fire Ins. Co.* v. *Empire Coal Min. Co., supra.*

The reviewing court in *Crombie & Co.* v. *Employers' Fire Ins. Co. of Boston, supra,* remarked, "A soda pop bottle blows the cap, or breaks the glass in a weak spot, so may the medicine bottle in the cabinet and the vinegar bottle in the pantry and it is said they explode." An expert witness in the instant case said a hopper-bottom-capped bin could be compared to an inverted corked bottle. The cork "would blow before you break the bottle." Of the force within, another (lay) witness said, "* * * just like canned things. Many a time, say, well, a jar has blown up in the basement, I didn't get it right see, air and fermentation take place and blew the thing up." This reminds us of the testimony of an expert, defendants' witness, whose experiment with wetted grains in three test tubes indicated the pressure due to imbibition forced out the stoppers of two of the tubes and broke the glass of the third. Should some high-pressure phenomenon in whatever contents of a stoppered bottle slowly start the stopper from its seat and then suddenly and violently

force the stopper completely out with a pop, we think one ordinarily would say there was an explosion.

Although in large measure plaintiff was necessarily relying upon circumstantial evidence to show the alleged explosions, there were facts and circumstances shown in evidence which were premises for reasonable inferences and an ultimate conclusion that the hopper bottoms were suddenly and violently expelled.

(The cases of *Allen* v. *Insurance Co. of North America*, 175 Pa. Super. 281, 104 A. 2d 191; *Hicks* v. *New York Fire Ins. Co.*, 266 Wis. 186, 63 N. W. 2d 59; and *Bauman* v. *Midland Union Ins. Co.*, 261 Wis. 449, 53 N. W. 2d 529, cited and greatly relied on by defendants, have been of little value to us here. In the *Allen* case, the appellate court reviewed the trial court's finding for defendant, which finding in that case had the force and effect of a jury verdict. In affirming the judgment, the appellate court did not examine the case from the standpoint of determining if the evidence supported a verdict for plaintiff. In the *Hicks* case, the expert witness testified three factors must exist simultaneously in order to produce excessive pressure, but there was no substantial evidence that, at the time plaintiff's radiator broke, any of the factors existed; therefore, the expert's opinion that the break in the radiator was due to the buildup of pressure was based on his own unwarranted assumptions. In the *Bauman* case, the question on the issue of explosion was solely whether there was any credible evidence sustaining a jury's finding that an explosion of carbon dioxide gas occurred within plaintiffs' silo causing it to burst. Plaintiffs' expert witnesses admitted that carbon dioxide will permeate loose vegetable matter and rise and escape through any opening. They would not venture an opinion as to whether such gas would, or would not, permeate through silage and escape through cracks between wooden doors of the chute, or out the open

window at the top of plaintiffs' silo. Neither would they venture any opinion that the accident was caused by the pressure of the gas. The testimony of defendant's experts did not aid plaintiffs' case.)

The clips of the "tanks" including those that were "in the basement" would give way suddenly, when forced to their maximum strength. The clips of those tanks that were in the basement were forced down equally, indicating, according to plaintiff's consulting mechanical engineer, that the tanks had been forced off rapidly or explosively. In this connection we note the evidence tending to show that the spouts of hopper bottoms which had been expelled were buckled in such fashion as to indicate that the hopper bottoms had gone "directly down." There was evidence of conditions potential in the creation of high-pressure gas within the bin-bases and hopper bottoms, and of occurrences and an occurrence manifested by sounds and a vibration timed to the approximate hours when the pressure of such gas, if present or evolving, would have been of increasing or of climatic pressure-force, according to the expert witnesses. The presence of tremendously high-pressure force due to imbibition is conceded. The sounds were not especially loud, and a vibration was not felt elsewhere than when witnesses were directly over a bin (101), the hopper of which it may be reasonably inferred was at that time expelled. Forty-three noises or reports were not heard, but a jury could reasonably resort to the other shown circumstances of the large concrete elevator structure consisting of wall-in bins and the sound-muffling waters remaining in the basement as plausible reasons why possible sounds or reports of the other events were not heard by persons not on the Texas floor when the events occurred. The absence of evidence tending to show forty-three distinct reports having been thus rationalized, the jury could then fall back upon and give decisive probative effect to the conceded circumstance

of the presence of tremendous high-pressure force or forces, the shown uniformly bent clips, the peculiarly crumpled spouts, the ruptured fissure, and the expert's opinions indicating the hopper bottoms were explosively expelled or ruptured. Of course, it is not the province of the appellate court to weigh the evidence or to determine what inferences and what conclusion should have been drawn; but these observations we believe are pertinent here as illustrating legitimate mental processes jurors may use in reasoning and reaching a reasonable conclusion from facts or circumstances which the evidence was substantial in tending to show.

We believe we could not write a better summary statement of law applicable in treating with the sufficiency of the evidence in this case than the statement made by this court in *Hardwick* v. *Kansas City Gas Co.*, 355 Mo. 100, at page 107, 195 S. W. 2d 504, at page 508, wherein as herein, it was urged that a jury's verdict was based on speculation and conjecture, and that no evidence supported the verdict. It was said, "It is true that much of the evidence is circumstantial and that some of the inferences must be drawn by choosing between the conflicting opinions of experts. But this is not to deprive the jury of its right and function to find some of the facts, even some facts essential to the plaintiff's case, by reasoning upon the evidence, even circumstantial evidence, and inferring from such evidence that a certain required thing or fact existed or was true. Thayer, Preliminary Treatise On Evidence, pp. 193; 194; *Van Brock* v. *First Nat. Bank*, 349 Mo. 425, 431-434, 161 S. W. 2d 258; 260-261." See also *Stephens* v. *Kansas City Gas Co.*, 354 Mo. 835, 191 S. W. 2d 601; *Brawley* v. *Esterly*, Mo. Sup., 267 S. W. 2d 655; *Helton* v. *Huckeba*, Mo. Sup., 276 S. W. 2d 78; *Lever Bros.* v. *Atlas Assur. Co., Ltd., supra.*

Generally, the assertedly "uncontradicted and undis-

puted" evidence, which defendants say is conclusive in demonstrating that the questioned occurrences were not explosions, was the testimony of millwrights, defendants' witnesses, employees of a company plaintiff had engaged to clean up the elevator and to restore it to operating condition. One witness came to the elevator location on July 21st, the other on July 28th. They stated that for several days after their arrival many of the hopper bottoms of such of the bins that contained grain and the bottoms of which had not become disengaged or expelled were slowly "creeping" down. "You would go in there one day and go back the next day and they would be a quarter of an inch where they were creeping, * * *."

Actually, the jury was not obliged to believe the testimony of defendants' witnesses. In examining the question whether there was substantial evidence to justify a submission, or the question whether the evidence was sufficient to support a verdict, the appellate court considers only the evidence most favorable to plaintiff, and the inferences to be drawn therefrom, and disregards the evidence of defendant unless it aids plaintiff's case. *Stephens v. Kansas City Gas Co., supra.* But if the jury believed the testimony of these witnesses, the jury was not obliged to draw the inference that the source of the pressure which caused the hopper bottoms to slowly creep down was the same or of the same force that some days before caused the hopper bottoms in issue to become detached or expelled and ruptured. But for the moment assuming the verity of the testimony of these witnesses for defendants that the hopper bottoms were slowly creeping down several days after July 17th, we have noted that these witnesses also said that, when the hopper bottoms were "creeping" down, "they would creep from the back first, * * * I mean you would get an opening in the back of the bin ('where this big part of the hopper is') before you would from the

front." This testimony that hoppers several days after July 17th were creeping down unevenly tends to support plaintiff's factual theory that, because the hopper bottoms herein involved left their settings *evenly*, they were expelled explosively.

It is further urged that "undisputed documentary evidence" also sustained defendants' theory of no explosion. One of these "documents," introduced by plaintiff, was a letter dated August 24, 1951, from a testing laboratory. The letter contained the laboratory's classification of explosions and the laboratory's view of the process and effect of explosions brought about by various causes. The letter also contained the statement, *inter alia*, that "it cannot be stated that any explosion took place within the hoppers or bin bottoms," and the letter continued by giving the laboratory's theory of the way the hopper bottoms were detached. Another letter from an architect-engineer dated August 24, 1951, was introduced by plaintiff. The writer expressed the view there was no evidence whatsoever "that these spouts had been forced loose by an explosion." The writer also advised that workmen "were also taking down the spouts that had not *blown down*." (Our italics.) The other document, introduced by defendants, was an undated "Computation of Loss Due to Flood of July 14, 1951," compiled under the supervision of plaintiff's secretary-treasurer. The computation included grain lost, the loss of much of which plaintiff seeks to attribute to explosion. These letters and the computation, of course, were not, as a matter of law, conclusive in demonstrating that no part of the loss sustained was due to explosion. The "documents," and their weight and probative effect, were matters for the consideration of the jury on the issues of the case. Likewise, the circumstance that one or more electric lights in the basement remained burning three days after the basement was flooded; and the circumstance that

the glass-encased 100-watt light bulb of a lamp, with an enameled metal shade, attached to the ceiling of the basement by a ball-and-socket swivel fixture within a foot or so of an expelled hopper bottom, had not been shattered, were inconclusive on the question of the sufficiency of the evidence in tending to support the issue of explosion. These circumstances and the opinions and explanations of and concerning them by the parties' witnesses were for the jury's consideration.

Defendants further contend that plaintiff's evidence as to damages or the amount of loss failed to separate those losses admittedly attributable to the flood alone from the loss sustained because of explosion. This contention is also developed in support of assignments of error in defendants' motion for a new trial, which motion the trial court overruled. Herein, in urging the propriety of the trial court's sustention of their motion for judgment, and in alleging error of the trial court in overruling their motion for a new trial (*Hughes* v. *St. Louis Nat. League Baseball Club*, 359 Mo. 993, 224 S. W. 2d 989), defendants contend and had assigned error of the trial court in submitting the issue of damages. It was assigned in the motion for a new trial and is asserted herein that the evidence failed to support a separation of damages; that the damages were excessive; and that no evidence supported the instructions.

Plaintiff had the burden of proving prima facie (and of establishing) the amount of its loss due to explosion alone. *Niagara Fire Ins. Co.* v. *Muhle*, 8 Cir., 208 F. 2d 191; *General American Ins. Co.* v. *Thompson*, Tex. Civ. App., 78 S. W. 2d 727.

Plaintiff's secretary-treasurer, and others, testified of plaintiff's work in the "cleanup" and restoration of the elevator to operation. This was accomplished by September 21, 1951. Plaintiff's current inventories showed the

amount of grains—wheat, corn, and grain sorghums—on the date of the flood of July 13th. "Weighups" during and subsequent to the cleanup determined the amount of the grain not damaged or destroyed. Plaintiff's secretary-treasurer was able to cause and supervise the computation of the quantity and market value of the respective types of all of the grains which were damaged or destroyed and to compute the approximate quantity and market value of the respective types of grain which would have been damaged in the bottoms of the bins had none of the grain been damaged or destroyed by occurrences other than the flood. It was computed that the total loss in grains due to the flood "and these other casualties" was $402,014.91. The loss that would have taken place had nothing occurred but the flood was computed in the amount of $75,992.76; the latter amount subtracted from the total loss left a balance of loss purportedly due to explosion in an amount of $326,-022.15. In arriving at the amount of loss ($75,992.76) attributed to the flood—by one computation, the percentage of the different grades of all grain loss having been determined, it was assumed the same ratio of grades was flooded and damaged in the bin bottoms had there been no other casualty; by another computation, the number of bins which had contained each grade of grain was ascertained, and the total of the approximate number of bushels of each grade per bin which would have been damaged had no other casualty occurred was determined. The number of bushels per grade so determined was multiplied by the price per bushel per grade. There was little difference in the results obtained by the two computations. Obviously, these computations would not show such ratio of loss between grades with precision, but in the circumstances that no exact separation could be shown, we are satisfied these computations provided a way for the jury to determine the separation with reasonable certainty.

Plaintiff was able to salvage quantities of damaged grain. Some was sold to farmers for use as feed for livestock. The original amount received for this salvaged grain was $20,818.46; from this sum receipts for salvage, which it was said would have been wetted and damaged had no casualty occurred other than the flood, were deducted, leaving an amount to be credited in the sum of $17,175.23. As stated, the computations were made under the direction of plaintiff's secretary-treasurer, who verified their correctness. These computations reflecting the result, $308,846.77, plus interest, comprise the amount of the jury's computations and verdict on Count I.

Plaintiff's secretary-treasurer testified that had there been no casualties other than flood, the elevator could have been put in operating condition in approximately ten days, and although there was very little business that could have been done in the first ten days after the flood, things "began to get going again" after ten (or fifteen) days. He doubted there would have been any appreciable reduction in plaintiff's gross earnings had there been no damage other than by the flood, because plaintiff within a few days could have cleaned, disinfected and used its installations and exploited the then current harvest and storage of grains. The witness spoke of other elevators which had not been damaged and which enjoyed after the flood "a very excellent business as a result." In effect, the testimony was that plaintiff would not have suffered any substantial reduction of gross earnings had there been no explosion. Consequently, the amount of reduction of gross earnings had been computed by accountants by subtracting plaintiff's gross earnings for the fiscal year ending April 30, 1952, from plaintiff's average gross earnings enjoyed and experienced in its business during the three immediately preceding fiscal years ending April 30th of 1951, 1950 and 1949, and to the result there was added

$59,007 for monies expended in bringing the elevator into operating condition, or, as plaintiff would say, in reduction of the period of interruption of business (an item within the coverage of the insurance certificates), and $10,052.79, received by plaintiff in sales of salvaged grains consummated since the institution of this action, was deducted. The ultimate apparent result of these computations, as found by the jury, was $332,422.21, which sum, plus interest, comprised the amount of the jury's award on Count II of plaintiff's petition.

The Computations which we have summarized seem to afford bases for a fairly certain separation of damages, save and except the item of $59,007, and interest thereon, which quite apparently was allowed by the jury in reimbursing plaintiff for expenses "necessarily incurred by plaintiff for reduction of the loss due to such interruption of business by explosion * * *." We are of the opinion an amount of the verdict equaling this item, and interest thereon, should not have been allowed. In plaintiff's cleanup and restoration operations, regardless of whether a hopper bottom of a bin had been detached, all grain had to be taken out of the bin. The undamaged grain had to be removed from all of the bins and all bins were required to be cleaned and disinfected, and the good grain returned to the cleaned and disinfected bins. In the instances where the hopper bottoms were not expelled, holes were cut in the metal of the hopper bottoms and a draw-off "sleeve jacked through the grain that had been wetted and since crusted over." The undamaged grain was then drawn from the bins by a screw conveyor; but the caked or crusted and damaged grain had to be dug out with pickaxes; the holes in the metal hopper bottoms were of necessity replaced by replating or welding. Other substantial restorations and repairs, too numerous to enumerate, were not made necessary by any casualty other than flood. It seems clear

at plaintiff did not and could not separate those expenses r restorations and repairs made necessary by flood in fecting the resumption of its business from those expendi- res made necessary by explosion. We consider this fail- e to prove that part of the $59,007 expenditures made ecessary by explosion amounted to a failure of proof as that whole item, and that the trial court erred in sub- itting the "reduction of loss" issue. However, we see no eason that such error may not be corrected by remittitur.

(In connection with the contention of defendants that the rial court erred in overruling defendants' motion for a ew trial, defendants assert error in ignoring or failing o submit the application of a contribution clause contained n the certificates covering loss due to business interrup- ion. It would seem defendants have the laboring oar on his appeal in alleging and supporting the allegations of rror in overruling defendants' motion for a new trial. *Hughes* v. *St. Louis Nat. League Baseball Club, supra.* The particular point relating to the contribution clause s not included in defendants' points and authorities sup- porting defendants' allegations of error. It is merely men- tioned in the printed argument without development and without citations of authorities as required by rule.)

Plaintiff contends the trial court erred in ruling, and defendants contend the trial court correctly ruled, that plaintiff was estopped to relitigate the issue of explosion. These contentions involve questions governed by principles of the doctrine of *res judicata.* The contentions require the examination of the record of a case tried in the United States District Court, District of Kansas. That case in- volved an action instituted by plaintiff against its lessor, City of Kansas City, Kansas, and lessor's assignee, The Minnesota Avenue, Inc., hereinafter sometimes also re- ferred to as "lessor," to recover on lessor's covenant to repair. The lease also contained a provision requiring

lessors to use for repairing all the proceeds, if necessary, received from any insurance policy covering a hazard causing damage to the elevator installations. After the institution of the instant action, defendants-lessors had by leave brought in insurers (defendants in the instant case) as third-party defendants. Although plaintiff had originally alleged damages to the elevator installations were due to flood and explosion, plaintiff amended its original complaints to allege the damage was due to flood and otherwise. Plaintiff was not the insured in the policies issued to lessors indemnifying for damage to the elevator facilities due to explosion, and the issue of explosion was not essential to plaintiff's recovery on its claim against lessors.

Insurers, third-party defendants in the Kansas case, filed answer, and counter-claim and cross-claim in two counts. In Count I the insurers sought a judgment against *plaintiff* and lessors declaring that damage was not due to explosion. The prayer for relief was as follows,

> "* * *, Third-Party defendants pray for a declaratory judgment adjudicating *that no damage claimed in plaintiff's complaint and amended complaint was caused by explosion;* that Third-Party defendants are not liable on policies of insurance referred to in Third-Party complaint and amended Third-Party complaint, *and that plaintiff* and the Third-Party plaintiffs, and each of them, *be enjoined from prosecuting any claim against Third-Party defendants,* or any of them, *in respect to the above-referred subject matter;* and for such other and further relief as is just and proper." (Our italics.)

In Count II of their counterclaim and cross-claim, insurers sought a judgment against plaintiff declaring there was no explosion and no liability to plaintiff under the policies which are involved in the instant action.

Plaintiff had been objecting to the third-party procedure. Plaintiff was also, in effect, contending the jurisdiction

of its case against insurers was in the Circuit Court of Jackson County, Missouri, wherein the instant action was then pending. Plaintiff was further urging it should not be required to make common cause with lessors on the issue of explosion, inasmuch as lessors in their original answer to plaintiff's original complaint and in their original third-party complaint denied that any of the alleged damage referred to in plaintiff's complaint was in fact caused by explosion.

The District Court ordered a trial of the issues of plaintiff's claim against defendants-lessors, of the issues of lessors' claim against the insurers, and of the issues of insurers' claim stated in Count I of their counterclaim and cross-claim against plaintiff and lessors. It was further ordered that trial of the issues raised in Count II of the counterclaim and cross-claim, "*and further consideration of the question whether any trial should be had in this court* (as to Count II), will be deferred until after trial of the issues referred to in the preceding paragraph of this order." (Our italics.)

Upon trial of the issues so ordered, plaintiff introduced evidence tending to support its claim; lessors introduced evidence tending to defeat plaintiff's claim and tending to support their claim against insurers; and insurers introduced evidence tending to defeat lessors' claim against them and tending to support their claim for a declaratory judgment against plaintiff and lessors. At this stage of the trial proceedings, plaintiff filed a motion for a directed verdict in its favor on Count I of insurers' counter-claim and cross-claim. After argument on the motion, the District Judge questioned insurers' counsel, as follows, "But the question now is you are asking apparently in your first count of the cross-claim in effect for a judgment against the grain company which did not purchase the policy and apparently has no interest in the policy." In-

surers' counsel disclaimed any such intention. The judge remarked, "Of course we are under the main issue in the case. We are certainly trying the issue of liability of the insurance companies to the City and Minnesota Avenue, Inc., under the policies of insurance issued to them. That is all we are trying, isn't it?" Whereupon the court was about to sustain plaintiff's motion for a directed verdict, but insurers' counsel asked leave to amend Count I "so that it confines the counterclaim to those policies under that count (Count I) that were issued to the City and Minnesota Avenue and as to the other count (Count II) which you are not trying now, that that is confined of course, to the policies issued to the grain company. * * * Let me withdraw that from the pleading. * * * I would prefer to withdraw it from the pleading so it would not necessitate having that kind of an order based on a pleading that apparently there was a mistake in, and I would like to correct that and that would eliminate the necessity of any order on it." The prayer of Count I of insurers' counter-claim and cross-claim was subsequently amended by leave so as to pray for the relief, as follows,

"* * *, Third Party Defendants pray for a declaratory judgment adjudicating that no damage claimed in Third-Party Plaintiffs' complaint and amended complaints was caused by explosion; that Third-Party Defendants are not liable on policies of insurance referred to in Third-Party complaint and amended Third-Party complaints, and that the Third-Party Plaintiffs, and each of them, be enjoined from prosecuting any claim against Third-Party Defendants, or any of them, in respect to the above-referred subject matter; and for such other and further relief as is just and proper."

At the conclusion of the trial, factual issues having been submitted to a jury, a verdict was returned for plaintiff against lessors for an amount which the court modified,

and judgment was rendered for plaintiff for $95,032.88 on plaintiff's claim against lessors. The jurors had not agreed upon an answer to the special question submitted—"Did any explosion or explosions occur following the infiltration of flood waters into the River Rail Elevator in July of 1951"—however, the District Court thereafter sustained insurers' motion for judgment in accordance with their motion for a directed verdict interposed at the close of all the evidence as to lessors' claim against insurers—a ruling, in effect, that lessors had failed to make out a case on their third-party complaint against insurers for loss due to explosion—and judgment was rendered in favor of insurers and against lessors on their claim for insurance.

We are of the opinion the judgment rendered in favor of insurers and against lessors on lessors' claim concluded neither the ultimate issue of liability nor any essential supporting issue of plaintiff's claim or cause of action against insurers on the policies involved in the instant case. A judgment is not generally a bar under the doctrine of *res judicata* to the further prosecution of claims or demands which were excluded by the court, and, therefore, were no part of the verdict and judgment. Neither is a question concluded by a judgment if it was withheld, or, although originally in issue or involved in an action, if it was excluded, withdrawn or ruled out by the court and which, therefore, was not a part of the verdict or finding and final judgment in a case. *Patterson Oil Terminals* v. *The Port Covington*, 3 Cir., 205 F. 2d 694; *Duval* v. *Duval*, 316 Mo. 626, 291 S. W. 488; *Cox* v. *Imes*, Mo. App., 219 S. W. 399; Vol. 2, Freeman on Judgments, 5th Ed., §§703-704, pp. 1483-1488; 50 C. J. S., Judgments, § 729, pp. 217-218.

It is true that in the trial of the issues of lessors' claim or cause of action against insurers an essential issue was

"explosion." Defendants herein urge that whether or not plaintiff and lessors in the Kansas case were in direct privity, plaintiff was "sufficiently close" to lessors to be bound by the adjudication of "no explosion," in the District Court's adverse ruling on lessors' claim against insurers. And again defendants say the true reason for holding an issue concluded by *res judicata* does not necessarily depend on privity, "but on the policy of the law to end litigation by preventing a party who has had one fair trial of a question of fact from again drawing it into controversy." *Taylor* v. *Sartorious*, 130 Mo. App. 23, 108 S. W. 1089. As we have noticed, the District Court in considering the sustension of plaintiff's motion for a directed verdict was of the view that plaintiff had no interest in the policies issued to lessors; and the judge also expressed the opinion that, apparently, there was no privity of contract claimed or asserted under which plaintiff would have any rights under the policies of insurance issued to lessors. Clearly plaintiff would have had no property right in any proceeds of such policies. The best that can be said for lessors on this phase of the argument is that lessors were obligated by their lease to use, if necessary, any proceeds of lessors' policies in the repair of their own elevator facilities leased to plaintiff. We think this is not of sufficiently "close" contractual relationship as to conclude plaintiff by the adjudication adverse to lessors on the issue of explosion in the situation here. We have also ascertained from the record of the Kansas case that plaintiff, after insurers had amended Count I, did not introduce evidence in refuting insurer's evidence tending to show "no explosion"; and, as we see it, there was no judgment entered adverse to plaintiff from which plaintiff could have perfected an appeal. It could hardly be said that plaintiff had a trial of that issue in the Kansas case. This, because we think the District Court withheld the

issues of plaintiff's claim herein from the trial and judgment entered in that case. Of course, it is the policy to end litigation where a party has had a fair trial on factual issues; but policy does not go so far as to deny a plaintiff a fair trial of issues supporting his separate claim.

As we have seen, insurers in Count I as originally drafted had prayed for a declaratory judgment affecting plaintiff on the issue of explosion, also decisive or essential issue of a trial of plaintiff's claim or cause of action on its policies of insurance involved in the instant case. According to insurers' counsel, the original draft designed to affect plaintiff, was an inadvertence, and counsel requested the District Court to withdraw the issue and was granted leave to amend so that the issue of "no explosion" purportedly raised against plaintiff was withdrawn or eliminated: whereupon plaintiff and insurers, if ever, were no longer adversary parties on the issue in the separate trial of the issues as ordered by the District Court. The District Court for the time had put aside the consideration of insurers' cross-claim (Count II) against plaintiff as to the policies involved in the instant case. It is our conclusion that insurers' counsel, when confronted with a probable adverse ruling, requested the withdrawal of the explosion issue by amendment in so-far as the issue affected plaintiff; and that the District Court permitted the amendment and reserved or withheld or limited the effect of the trial of the issues in the District Court with respect to plaintiff so that the judgment for insurers against lessors did not affect or bar plaintiff's claim or cause of action and right of recovery on the policies involved in the instant action.

The judgment for defendant should be reversed, and, if plaintiff will within fifteen days enter a remittitur of $71,005.12 ($59,007 plus $11,998.12, interest thereon to the date of the original judgment for plaintiff, February 4,

1955), the original judgment for plaintiff should be affirmed for $698,517.62 as of the date of the entry of such original judgment; otherwise, the cause should be remanded for a new trial.

It is so ordered.

PAUL VAN OSDOL,
Commissioner.

COIL, *C.*, Concurs.
HOLMAN, *C.*, Concurs.

PER CURIAM: The foregoing opinion by Van Osdol, *C.*, is adopted as the opinion of the court.

All of the Judges concur.

REMITTITUR.

Remittitur (caption omitted) filed by the Grain Company, plaintiff-appellant below, on September 21, 1956:

REMITTITUR.

Pursuant to the opinion of the Court filed herein on September 10, 1956, Plaintiff-Appellant hereby remits from the original judgment the sum of $71,005.12 (being the principal sum of $59,007.00 plus interest thereon to the date of the original judgment in the amount of $11,998.12).

RALPH M. JONES,
CHARLES B. BLACKMAR,
BLACKMAR, SWANSON, MIDGLEY, JONES & EAGER,
906 Commerce Building,
Kansas City 6, Missouri,
Attorneys for Appellant.

Copy received September 19, 1956.
DONALD N. CLAUSEN,
By JOSEPH R. HOGSETT,
Attorneys for Respondents.

JUDGMENT.

On September 21, 1956, the Supreme Court of Missouri entered the following judgment (caption omitted):

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be reversed, annulled and for naught held and esteemed. In compliance with the order heretofore made by this Court on the 10th day of September, 1956, comes now the appellant, by attorney, and files a remittitur in the sum of Seventy-one Thousand and Five Dollars and Twelve Cents ($71,005.12), part and parcel of the original judgment entered on the 4th day of February, 1955, in this cause in the Circuit Court of Jackson County. It is therefore considered and adjudged by the Court that the original judgment aforesaid, by the said Circuit Court of Jackson County rendered on the 4th day of February, 1955, be reinstated and affirmed, and stand in full force and effect, for the sum of Six Hundred Ninety-eight Thousand Five Hundred and Seventeen Dollars and Sixty-two Cents ($698,517.62), with interest thereon from the 4th day of February, 1955, at the rate of six per cent per annum, and that the said appellant recover against the said respondents its costs and charges herein expended, and have therefor execution.

SECTION 1 OF ARTICLE IV OF THE CONSTITUTION OF THE UNITED STATES.

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION 509.100 OF THE REVISED STATUTES OF MISSOURI, 1949.

509.100. Failure to deny, effect

Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleadings. When a reply is filed, whether required or not, all affirmative defenses of the answer which are not denied in the reply are deemed admitted. Averments in a pleading to which a responsive pleading is not filed and is not required shall be taken as denied or avoided. (L. 1943, p. 353, § 41.)

STIPULATIONS OF ADMITTED FACTS OFFERED IN EVIDENCE BY THE GRAIN COMPANY IN THE KANSAS CASE. (ESTOP. EXH. VOL. I, PP. 197-201, AND ALSO ESTOP. EXH. VOL. III, PP. 827-833) AND IN THE MISSOURI CASE (TR. 136-141):

In the Kansas Case. (Estop. Exh. Vol. I, p. 197-201.)	*In the Missouri Case.* (Tr. 137.)
1. On July 14, 1951, at about 5:00 P.M. the Missouri River Levee broke at a point approximately 1300 feet northeast from the head house of the river rail elevator.	1. On July 14, 1951, at about 5:00 P.M., the Missouri River Levee broke at a point approximately 1300 feet northeast from the headhouse of the River-Rail Elevator.
2. The flood waters entered and filled the basement of the elevator during the night of July 14 and 15, 1951.	2. The flood waters entered and filled the basement of the elevator during the night of July 14, 1951.

3. There is a bench mark in the center of the pavement approximately 850 feet equally distant between the river and the elevator, the elevation of which is 749.14 feet above sea level.

4. The grade at the storage bins is 751.45 feet above sea level and lower surface of the bin bottoms of the elevator is at the same level. This is as per the drawings, see plan 30.

5. The concrete slabs at the bottom of the bins of said elevator is one (1) foot thick. The cone of the bin bottoms projects into the concrete slabs so that the vertical distance from the bottom of the bins to the point where the cone takes off is eight inches.

6. Measurements taken at the north end of storage bin A, show that the water reached a maximum height of 2 feet 9 inches above grade at that point.

7. The flood waters reached a maximum height of slightly more than 2 feet in the conical portion of the bin bottoms plus the small cylinder height of 8 inches of the draw off openings themselves.

8. The current of the flood waters was in a direction away from the elevator and the elevator was never subjected to the current of the flood waters.

9. The flood waters were quiet in the basement of the elevators and did not slosh about, meaning that the waters

3. The lower surface of the bin bottoms of the elevator is at ground level.

4. The concrete slab at the bottom of the bins of said elevator is one foot thick. The cone of the bin bottoms projects into the concrete slab so that the vertical distance from the bottom of the bins to the point where the cone takes off is eight inches.

5. Measurements taken at the north end of storage bin A show that the water reached a maximum height of 2 feet 9 inches above ground level at that point.

6. The flood waters reached a maximum height of slightly more than 2 feet in the conical portion of the bin bottoms above the small cylinder height of 8 inches of the draw-off openings themselves.

7. The elevator was never subjected to the current of the flood waters.

8. The flood waters were quiet in the basement of the elevator and did not slosh about, meaning that the waters in the base-

in the basements of the elevators were more or less stationary.

10. The official measurements of the Missouri River at gauge points located at the Kansas City, Kansas waterworks, the North Kansas City waterworks and the Hannibal Bridge show the following stages on these dates: Stage at 7:00 A.M., July 14, 1951, at Kansas City, Kansas waterworks 34.2 feet; North Kansas City waterworks 34.1 feet; Hannibal Bridge 36.2 feet. At 7:00 A.M., July 15, 1951, at Kansas City, Kansas waterworks 33 feet; at North Kansas City waterworks 32.7 feet; at Hannibal Bridge 34.5 feet. The difference during that 24-hour period at Kansas City, Kansas waterworks was 1.2 feet; at North Kansas waterworks 1.4 feet; at Hannibal Bridge 1.7 feet. The stage at 7:00 A.M., on July 16, 1951, at Kansas City, Kansas waterworks 29.6 feet; North Kansas City waterworks 29 feet; Hannibal Bridge waterworks 31.6 feet; the difference being at Kansas City, Kansas waterworks 3.4 feet; at North Kansas City waterworks 3.7 feet; at Hannibal Bridge 2.9 feet.

11. On Monday morning, July 16, 1951, the pavements around the elevator were reasonably clear of water.

12. On Monday morning, July 16, 1951, there was water on the lower surface of the bin bottoms, the hoppers and spouts being still submerged.

ments of the elevator were more or less stationary.

9. The official measurements of the Missouri River at gauge points located at the Kansas City, Kansas, Waterworks, the North Kansas City Waterworks and the Hannibal Bridge show the following stages on these dates: Stage at 7:00 A.M., July 14, 1951, at Kansas City, Kansas, Waterworks, 34.2 feet; North Kansas City Waterworks 34.1; Hannibal Bridge 36.2 feet. At 7:00 A.M., July 15, 1951, at Kansas City, Kansas, Waterworks 33 feet; at North Kansas City Waterworks 32.7 feet; at Hannibal Bridge 36.2 feet. * * * The difference during that 24-hour period at Kansas City, Kansas, Waterworks was 1.2 feet; at North Kansas City Waterworks 1.4 feet; at Hannibal Bridge 1.7 feet. The stage at 7:00 A.M., July 16, 1951, at Kansas City, Kansas, Waterworks 29.6 feet; North Kansas City Waterworks 29 feet; Hannibal Bridge 31.6 feet; the difference being at Kansas City, Kansas, Waterworks 3.4 feet; at North Kansas City Waterworks 3.7 feet; at Hannibal Bridge 2.9 feet.

10. On Monday morning, July 16, 1951, the pavements around the elevator were reasonably clear of water.

13. The river rail elevator is arranged and designed in such a manner that grain is discharged from each bin through individual draw off spouts connected to the under side of each bin. The spouts sloped to and discharge into belt conveyors below.

14. The round bins are 19 feet inside diameter and the draw off hole at the bottom is 5 feet in diameter. The draw off holes are in the center of all bins.

15. The height of the bins is 106 feet and 6 inches to the undersurface of the bin bottoms.

16. The slope of the bin bottoms is three to two horizontal to vertical.

17. The volume of the conical section of the round bin bottoms is 587.8 cubic feet.

18. The volume of the cylinders through the floor sections of the bins is 13.1 cubic feet.

19. The spout sections which are attached to the hopper bottoms are of welded metal construction, consisting of three 3/16 inch thick bottom plate, 12 gauge top and side plates with bolted flanged connections.

20. At contact with the concrete the hopper bottom is octagonal in shape with the diameter of the inscribed circle, the same as the concrete opening, with a 2 inch by 1½ inch by 3/16 inch welded angle completely around the hopper bottom periphery at this point.

11. The River-Rail Elevator is arranged and designed in such a manner that grain is discharged from each bin through individual draw-off spouts connected to the under side of each bin. The spouts slope to and discharge into belt conveyors below.

12. The round bins are 19 feet inside diameter and the draw-off holes are in the center of all bins.

13. The inside height of the bins is 105 feet and 1 inch.

14. The slope of the bin bottoms is 36 degrees from horizontal.

15. The volume of the 8 inch cylinders through the floor sections of the bins is 13.1 cubic feet.

16. The spout sections which are attached to the hopper bottoms are of welded metal construction, consisting of three 3/16 inch thick bottom plate, 12 gauge top and side plates with bolted flanged connections.

17. At contact with the concrete the hopper bottom is octagonal in shape with the diameter of the inscribed circle, the same as the concrete opening, with a 2 inch by 1½ inch by 3/16 inch welded angle completely around the hopper bottom periphery at this point.

18. The hopper bottoms previously referred to do not include the dryer bin located in the headhouse.

21. The hopper bottoms previously referred to do not include the dryer bin located in the head house.

22. According to the plans, the hopper bottoms were to be secured as follows: Sixteen ⅝ inch bolts were symmetrically imbedded in the concrete bin bottoms around the periphery of the draw off hole, to which were attached by nuts, clips of ¼ inch steel plate which supported the top angle of the hopper bottoms.

23. The magnitude of forces exerted by wetted grain in a substantially confined state as in the bins and hopper bottoms in the case at bar, can be experimentally determined.

24. The principles of similitude or scaling up, the magnitude of forces so experimentally determined can be applied with reasonable accuracy to the situation existing in the bins and hopper bottoms in the case at bar, at the time the grain became wetted by the flood waters.

25. Prior to the flood no clips bent sufficiently so that any hopper bottoms fell.

26. The formula known as the Janssen Formula is commonly used by engineers and designers for determining vertical and lateral pressures in bins for the storage of granular substances.

27. Plus or minus 5% the correctness of the following weights are admitted:

19. According to the plans, the hopper bottoms were to be secured as follows: Sixteen ⅝ inch bolts were symmetrically imbedded in the concrete bin bottoms around the periphery of the draw-off hole, to which were attached by nuts, clips of ¼ inch steel plate which supported the top angle of the hopper bottoms.

20. Plus or minus 5 per cent the correctness of the following weights are admitted:

a. Weight of hopper bottom including top angle iron 228.5 pounds.

b. Rack and pinion gate 163 pounds.

c. A 3-foot section of standard spout 38 pounds per foot.

d. Wheat per bushel maximum pounds 64 minimum 51 pounds, standard 60 pounds.

e. Corn per bushel maximum 60 pounds, minimum 44 pounds, standard 56 pounds.

f. Sorghum per bushel maximum 58 pounds, minimum 49 pounds, standard 55 pounds.

g. Wheat per cubic foot maximum 51.4 pounds, minimum 41 pounds, standard 48.2 pounds.

h. Corn per cubic foot maximum 48.2 pounds, minimum 35.3 pounds, standard 45 pounds.

i. Sorghum per cubic foot, maximum 46.6 pounds, minimum 39.3 pounds, standard 44.2 pounds.

28. The clips involved in the case at bar were made from ordinary low carbon hot rolled steel.

29. The volume of the hopper bottom involved in the case at bar is 27.2 cubic feet, this does not include the dryer bin bottom.

a. Wheat per bushel maximum 64 pounds, minimum 51 pounds, standard 60 pounds.

b. Corn per bushel maximum 60 pounds, minimum 44 pounds, standard 56 pounds.

c. Sorghum per bushel maximum 58 pounds, minimum 49 pounds, standard 55 pounds.

d. Wheat per cubic foot maximum 51.4 pounds, minimum 41 pounds, standard 48.2 pounds.

e. Corn per cubic foot maximum 48.2 pounds, minimum 35.3 pounds, standard 45 pounds.

f. Sorghum per cubic foot, maximum 46.6 pounds, minimum 39.3 pounds, standard 44.2 pounds.

21. The clips involved in the case at bar were made from ordinary low-carbon hot-rolled steel.

COMPARISON OF WITNESSES TESTIFYING WITH RESPECT TO THE EXPLOSION ISSUE IN THE KANSAS AND MISSOURI CASES.

The Kansas Case.	*The Missouri Case.*
Paul D. Bartlett, Jr., Secretary-Treasurer of the Grain Company, (Estop. Exh. Vol. II—87, 114, 115, 120, 122-124, 140-144, 235, 241, 244-248, 250, 257-259. Vol. III—745, 748, 776-780, 784-785).	Paul D. Bartlett, Jr., (Tr. 142-266, 319-325, 742-755, 1126-1135).
Emmett Byrd, Assistant Superintendent of the Grain Company, (Estop. Exh. Vol. II—281-290, 294-300, 326-335, 355-366, 370-408).	Emmett Byrd, (Tr. 328-348).
Camden W. Riley, Superintendent of the Grain Company, (Estop. Exh. Vol. III—411-427, 582-585, 594-598, 702-721).	Camden W. Riley, (Tr. 267-316).
Mitchell B. Shafer, The Weighmaster of the Grain Company, (Estop. Exh. Vol. IV—930-954).	Mitchell B. Shafer, (Tr. 349-370).
Dr. Fred Kurata, Professor of Chemical Engineering, University of Kansas, (Estop. Exh. Vol. IV—956-1117).	Dr. Fred Kurata, (Tr. 443-540).
Clayton Hill, Superintendent for Harry Surface Company, (Estop. Exh. Vol. V—1206-1280).	Clayton Hill, (Tr. 770-841).
Eugene P. Farrell, Milling Technologist, Kansas State College, (Estop. Exh. Vol. V—1320-1515).	Eugene P. Farrell, (Tr. 906-1010).

George Vaughan, Millwright for Harry Surface Company, (Estop. Exh. Vol. V — 1516-1545).	George Vaughan, (Tr. 841-861).
Max Milner, Professor of the Department of Flour & Feed Milling Industries, Kansas State College, (Estop. Exh. Vol. VI —1731-1751, 1757-1816).	Max Milner, (Tr. 1057-1113).
L. C. McDonald, Consulting Engineer, Kansas City, Missouri, (Estop. Exh. Vol. VI— 1866-1890).	L. C. McDonald, (Tr. 605-676).

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JOHN T. FEY, C

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 679.

AETNA INSURANCE COMPANY, a Corporation, et al.,
Petitioners,

vs.

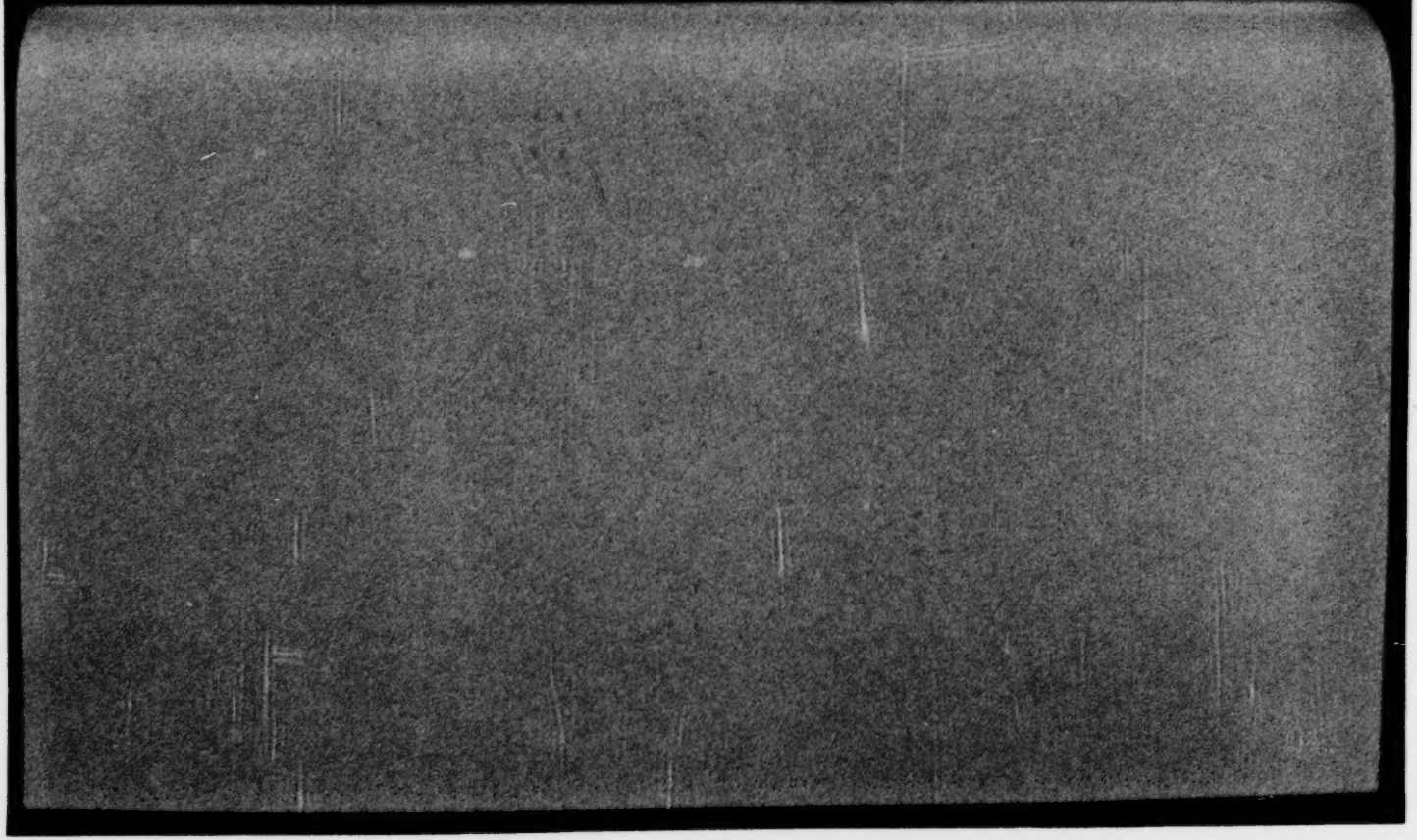
HART-BARTLETT-STURTEVANT GRAIN COMPANY,
a Corporation, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI (WITH APPENDIX).

RALPH M. JONES,
CHARLES B. BLACKMAR,
906 Commerce Building,
Kansas City 6, Missouri,
Counsel for Respondent.

BLACKMAR, SWANSON, MIDDLEY, JONES & EAGEN,
Kansas City, Missouri,
Of Counsel.

R. L. Polk & Co., Inc., 1956 Law Binder, Kansas City 6, Mo., Number 3-1956



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Cushing v. *Laird*, 107 U. S. 69 18

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Missouri Revised Statutes, Sec. 509.010 ..... 2, 7, A1
2 Moore, Federal Practice, 2d Ed., Section 13.06, page 16, Section 14.17, page 443 18
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 679.

AETNA INSURANCE COMPANY, a Corporation, et al.,
Petitioners,

vs.

HART-BARTLETT-STURTEVANT GRAIN COMPANY,
a Corporation, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

QUESTIONS PRESENTED.

The single "question presented" as set forth in the petition is deceptively misleading, in that it implies that Respondent was a party to the judgment relied on by Petitioners, which it was not. We therefore elect to restate the Questions Presented as follows:

1. Does this Court have jurisdiction to review a decision of a division of the Supreme Court of Missouri, to which no constitutional claim was presented, when a subsequent motion for rehearing or to transfer to the Court *en banc*, seeking to raise such a claim was denied without opinion?

2. Is a federal question presented as to the binding effect of a judgment on Respondent, which was not a party thereto, because of a contention that extrinsic facts and circumstances create a relationship of legal identification or privity with parties?

3. When all issues between Petitioners and Respondent were removed from the scope of a trial involving multiple parties and multiple issues, by leave of court upon a request of Petitioners, was Respondent bound by a judgment thereafter rendered in favor of Petitioners and against others?

4. Was there a sufficiently close legal relationship between Respondent and its lessors so that a judgment denying recovery to lessors under their insurance policies covering damage to the leased premises, in which policies Respondent had no interest, would bind Respondent on a claim for recovery under separate and distinct policies issued to it and covering its own separate interests?

All of these questions call for a negative answer.

STATE CONSTITUTION, STATUTES AND COURT RULES INVOLVED.

(Full Text in Appendix.)

Constitution of Missouri, Art. V, Sec. 9.
Missouri Revised Statutes, Sec. 509.010.
Missouri Supreme Court, Rules 1.08 (a), (c); 2.02.

STATEMENT OF THE CASE.

We believe that Petitioners' lengthy, argumentative, and repetitious statement of the case is unjustified, and that the material facts can be quite readily understood by reading that portion of the opinion of the Supreme Court of Missouri which discusses Petitioners' claim of estoppel by judgment (Pet. App., pp. xxix through xxxv). We cannot possibly set forth all points of disagreement within the compass of this brief, but because of the argumentative matter and some significant omissions, we shall supplement Petitioners' statement briefly:

(1) A glaring omission is the failure of Petitioners to advise this Court that, prior to judgment in the Kansas case, the explosion issue, as it affected Respondent, had been expressly withdrawn at the request of Petitioners themselves, and Respondent had therefore introduced no evidence on that issue.

At the commencement of the Kansas trial, the claims stated in the pleadings were as follows: (1) Respondent's claim for damages against its lessors on the covenants of the lease, which claim did not involve explosion or insurance in any way; (2) a third party complaint by the lessors against their insurers, including Petitioners, seeking a recovery over against the insurance companies for such part of Respondent's claim as might be adjudged against them which had resulted from explosion; and (3) a counterclaim and cross-claim for declaratory judgment by the insurance companies, seeking a declaration against the lessors and Respondent that no explosion had occurred. Respondent was not a party to the third party complaint, and had no rights under the insurance policies there sued on. Respondent had objected to the third party procedure, and had sought a

separate trial, but the objections raised prior to commencement of the trial had been denied by the court.

The order of proof at the trial is described in the opinion below (App. to Pet., p. xxxi). At the conclusion of the third-party defendants' case, and before Respondent had introduced any evidence of its own on the explosion issue, Respondent filed a motion seeking the withdrawal of that issue as applied to it (Estop. Exh., p. 1817). Several reasons were assigned, including lack of jurisdiction over the subject matter on the ground that it and the Kansas City Fire & Marine Insurance Company, which held the bulk of the insurance involved in the Kansas litigation but not in the Missouri litigation, were both Missouri corporations, and prejudice arising out of admissions against interest on the part of the lessors, one of which had an interlocking directorate and officers with such petitioner (Estop. Exh., Vol. 2, pp. 66-7), prejudicial to the explosion issue.

During argument on this motion the following took place (Estop. Exh., pp. 1828-9):

> "The Court: It is hard for me to see that there can be an issue to be resolved under general application for declaratory judgment as to the group of policies issued by the insurance companies to Minnesota Avenue, Inc., and the City, how the grain company can have any interest in those policies.
>
> "Mr. Clausen [then and now counsel for Petitioners]: I agree with you.
>
> "The Court: I think probably the motion upon the ground which the Court has suggested in its discussion, the motion should be sustained and there will be no issue submitted under the declaratory judgment cross-complaint as to the first count and as to the plaintiff in the action, but the trial has proceeded upon the liability of the insurance companies to Minnesota Avenue, Inc., and the City.

"Mr. Clausen: If Your Honor please, may I make a suggestion. Before you do that finally, it would look silly on our record and our pleadings to have that kind of a prayer which I didn't realize myself. Let me withdraw that from the pleading. I don't want to have that kind of a thing go up to a court of appeals because that was a mistake as far as I personally am concerned and I would prefer to withdraw it from the pleading so it would not necessitate having that kind of an order based on a pleading that apparently there was a mistake made in, and I would like to correct that and that would eliminate the necessity of any order on it."

Counsel for the insurance companies then requested and obtained leave to amend the "counterclaims and cross-claims" involved in the trial, so as to omit any reference to, or request for declaratory judgment against, Respondent (Estop. Exh., 1858). The amended prayer is quoted in the opinion below (Pet. App., p. xxxii). The judgment rendered in the Kansas case on the explosion issue was not entered against Respondent (Pet. 13), and Respondent was not a party to it in any way.

(2) All of the participation by Respondent in the trial of the explosion issue in Kansas referred to by Petitioners both in the statement and in the argument, occurred before the above-described amendment, as the Supreme Court of Missouri observed (Pet. App., xxxiv). The stipulation set out at length in the appendix had been agreed upon prior to the trial, for the convenience of all parties, and the facts stated therein would obviously be material to the defenses raised by lessors. The matters detailed on pages 16 through 20 of the statement all occurred prior to the filing of the third-party complaint, and long before the trial.[1]

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[1]If it has any significance, Petitioners' claim that the Missouri case was submitted on the same evidence as was the Kansas case

(3) The matters introduced by the caption on page 26 of the petition are purely argumentative, and are not supported by the record. Both the Supreme Court of Missouri and the United States District Court in Kansas found that Respondent neither had nor claimed any interest in its lessors' insurance policies, and was not the "real party in interest" on any claim for the proceeds, as the following extracts from the opinion demonstrate:

> "Plaintiff was not the insured in the policies issued to lessors indemnifying for damage to the elevator facilities due to explosion, and the issue of explosion was not essential to plaintiff's recovery on its claim against lessors." (Pet. App., p. xxx).
>
> "As we have noticed, the District Court in considering the sustension of plaintiff's motion for a directed verdict was of the view that plaintiff had no interest in the policies issued to lessors; and the judge also expressed the opinion that, apparently, there was no privity of contract claimed or asserted under which plaintiff would have had any rights under the policies of insurance issued to lessors. Clearly plaintiff would have had no property right in any proceeds of such policies." (Pet. App., p. xxxiv).

(Pet., p. 25) simply is not so. Respondent's witnesses in the Kansas case did not testify on the explosion issue, except possibly on cross-examination by the lessors and insurers. Numerous witnesses testified for Respondent in the Missouri case who had not testified in Kansas, to-wit: Saeger (Mo. S. Ct., Tr. 327), Roethe (419), Darbe (541, 567), Poisner (554), Studna (624), F. W. Bartlett (685), Kappeler (692), Benberg (695); and Bevan gave testimony (862) for Petitioners which was found by the Supreme Court of Missouri to aid Respondent. Also, in the Missouri case there were offers of proof for other witnesses, and numerous additional exhibits including motion pictures of experiments (635).

(4) We cannot determine what part of the statement is designed to comply with this court's Rule 23(f). In Point II of our argument we will show that no federal questions were timely raised in the Missouri courts.

Petitioners did not raise any question of full faith and credit in their answer, or in their brief or oral argument in the Supreme Court of Missouri. On February 2, 1954, Petitioners filed a second amended answer to plaintiff's petition in the trial court, and went to trial on this pleading (Tr. 47-57). Count III contained a claim that Respondent was estopped to relitigate the explosion issue, by reason of its participation in the trial of that issue in the Kansas litigation. Count IV asserted that Respondent was so estopped by reason of its legal relationship with its lessors. A copy of the Kansas judgment on the explosion issue was attached to the answer, and this showed on its face that Respondent was not a party to it (Pet., p. 13). No claim was made that this judgment was conclusive on Respondent by reason of the full faith and credit clause.[2]

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[2]Petitioners are manifestly in error in assuming that a reply to this answer was required by Missouri law, or that there is any admission because no reply was filed. The Missouri law of pleading is substantially the same as the system prescribed by the federal rules, and no reply is required unless the answer contains a counterclaim, or unless the court expressly orders a reply. When no further pleading is required, all allegations of the opponent's pleading are taken as denied or avoided. This is shown by Missouri R. S., § 509.100 (Pet. App., p. x1) and 509.010 (our App.). In the case of *McIntosh* v. *Foulke*, 360 Mo. 481, 228 S. W. 2d 757, quoted from by Petitioners under their third point and described by them as "parallel in all respects to the pleading aspect present here," the answer prayed affirmative relief and the court had previously *ordered* a reply, which order was not complied with. There was no such order or claim in the present case. This case was cited on another point in Petitioners' brief in the Supreme Court of Missouri, but this is their first assertion that a reply was required.

Petitioners admit that they did not argue the full faith and credit clause before Division One of the Supreme Court of Missouri, and that this claim was first presented on transfer to the Court *en banc* (Pet. 9, 10, 32), which motion was denied without opinion (Pet. 3). The opinion below discusses all claims presented in the briefs, but contains no reference to the question of full faith and credit.

ARGUMENT.

POINT I.

Petitioners Show No Reason for the Exercise of This Court's Discretionary Jurisdiction.

Not one line in the petition shows existence of any of the standards for guidance set forth in Rule 19 of the Court as to certiorari proceedings, nor is any reason of equivalent importance suggested. Petitioners simply seek further review of a lawsuit presenting unique circumstances which probably never will recur. At the very most their claimed constitutional question is nothing "beyond the academic or the episodic," Cf. *Rice* v. *Sioux City Cemetery*, 349 U. S. 70.

No ground for further review is stated simply because the Supreme Court of Missouri reached a conclusion on the merits different from the opinion of a Kansas federal judge, who was considering an evidentiary showing made by different parties. This Court does not review legal conclusions on matters of purely local law, and such differences of legal opinion are inherent in our federal system. *Riley* v. *New York Trust Company*, 315 U. S. 343, l. c. 349.

It is difficult to see what rule of general application Petitioners claim should be evolved in or applied to this case. What they apparently ask this Court to do is to review a massive record and hold that this record compels the conclusion that Respondent must be bound by a judgment to which it was not a party, on a theory that it was the "real party in interest" in its lessors' claims on their insurance policies. They must concede that to reach this result it would be necessary for this Court to arrive at a construction of the lease different from that reached both by the Kansas federal court and by the Supreme Court of Missouri, and that inferences must be drawn from the record which were not drawn by the lower courts. They admit that no precedent supports their claim (Pet. 51), nor is any constitutional authority cited which it is claimed the Supreme Court of Missouri overlooked or failed to follow. There simply is no question of general interest or importance so as to justify further appellate proceedings in this private suit over insurance contracts.

POINT II.

No Federal Question Was Properly Presented by Petitioners to the Missouri State Courts, and This Court Therefore Lacks Jurisdiction.

This Court has said many times that it will not review a claim of federal right which was not presented to the state courts. See, *e. g.*, *Walters* v. *St. Louis*, 347 U. S. 231. The burden is on Petitioners to show that federal questions were presented to and decided by the state court, *Lynch* v. *New York*, 293 U. S. 52. Here the opinion of the Supreme Court of Missouri is entirely silent as to the federal questions now claimed to exist.

In the case of *Manhattan Life Insurance Company* v. *Cohen*, 234 U. S. 123, l. c. 134, Mr. Chief Justice White said:

> "* * * Moreover, as a general rule, it is true that for the purposes of review by this court rights under the full faith and credit clause, § 1, Article IV of the Constitution, come within that class which are required to be expressly set up and claimed in the court below. *Johnson* v. *New York L. Ins. Co.*, 187 U. S. 491, 47 L. Ed. 273, 23 Sup. Ct. Rep. 194; *El Paso & S. W. R. Co.* v. *Eichel*, 226 U. S. 590, 597, 57 L. Ed. 369, 373, 33 Sup. Ct. Rep. 179; *Chicago, I. & L. R. Co.* v. *Hackett*, 228 U. S. 559, 565, 57 L. Ed. 966, 968, 33 Sup. Ct. Rep. 581. * * *."

Later holdings to the same effect are *Hartford Life Insurance Company* v. *Johnson*, 249 U. S. 490, and *Chandler* v. *Manifold*, 290 U. S. 665.

There was no claim of any federal right in the amended answer, on which Petitioners went to trial. The answer simply alleged that Respondent was estopped by a judgment to which it was not a party, without any mention of the full faith and credit clause. Such questions as these are not necessarily federal questions, as is shown by the following quotation from *El Paso and Southwestern Railroad Company* v. *Eichel and Weikel*, 226 U. S. 590, l. c. 597; describing a claim that a state statute was entitled to full faith and credit:

> "The points raised by plaintiff in error that are now relied upon as an assertion of Federal Rights were brought to the attention of the trial court and of the court of civil appeals like any other of the multitude of questions that were raised in those courts; and, so far as appears, the decision in both courts proceeded not in disregard of any Federal right asserted or suggested, nor even in disregard of the de-

cisions of this court or of the authority of those decisions, * * *."

Petitioners admit that they did not present any question of the full faith and credit clause to the Supreme Court of Missouri in their brief or oral argument to that court (Pet. pp. 9, 10, 32). Their statement of points required in that Court (Our App.) mentions no federal claim. They seek to excuse this failure simply on the ground that they were appellees at that stage, thus intimating that they were not required to present the point until after the opinion of the Supreme Court of Missouri, adverse to them, was handed down. The claimed excuse is not sufficient. Any argument that the Constitution required that the Kansas judgment be so applied as to conclude Respondent was as available to them then as it is now, and under the law of Missouri, as under any orderly system of appellate practice, the appellee has the duty of setting forth all grounds on which he relies in seeking affirmance, *Hughes* v. *St. Louis National League Baseball Club*, 359 Mo. 993, 224 S. W. 2d 989. An appellee will not be permitted to raise points in a motion for rehearing or for transfer to the court *en banc*, which were not presented at the initial hearing. *State ex rel. Cole* v. *Matthews*, (Mo. Sup.) 274 S. W. 2d 286; *State ex rel. Perrine* v. *Keirnan*, 361 Mo. 871, 237 S. W. 2d 156; *Leath* v. *Weaver*, (Mo. App.) 202 S. W. 2d 125.

In *Dorrance* v. *Pennsylvania*, 287 U. S. 660, this court denied certiorari for want of jurisdiction because the Petitioner, who had been *appellee* in the Supreme Court of Pennsylvania, had failed to present the federal questions relied on to that court, even though they had been presented to the trial court and petitioner had been successful there.

This court has consistently held that federal questions must be presented in the state courts in compliance with the state procedure. For many years Missouri has strictly enforced a requirement that constitutional questions be presented at the earliest opportunity. When such points are available at the time of answering, as they were here, their initial presentation in a motion for new trial or thereafter, as Petitioners tried (Pet. p. 8), comes too late, *Severson* v. *Dickerson*, (Mo. App.) 248 S. W. 595; *Marczuk* v. *St. Louis Public Service Company*, 355 Mo. 536, 196 S. W. 2d 1000. In numerous cases arising from Missouri, this court has approved the Missouri procedure and has declined further review for noncompliance. See, *e. g.*, *Hartford Life Insurance Company* v. *Johnson*, 249 U. S. 490; *Mergenthaler Linotype Co.* v. *Davis*, 251 U. S. 256.

No federal question was discussed or passed on in the opinion of the Supreme Court of Missouri, although that opinion covered thoroughly everything presented in the briefs including numerous alternative claims made by Petitioners. In accordance with repeated decisions of this court (*e. g.*, *Ellis* v. *Dixon*, 349 U. S. 458), it must be assumed that the opinion did not discuss the federal questions because they had not been properly preserved and presented. Under Missouri law, this failure could have been both (a) because they were not contained in the answer filed in the trial court, and (b) because of Petitioners' failure to brief and argue them before the Supreme Court. Petitioners have failed to meet their burden of showing affirmatively that they seek review of a federal question presented to and decided by the Missouri courts.

Following the decision of Division One of the Supreme Court of Missouri. Petitioners attempted to raise federal questions in a motion for rehearing or in the alter-

native for transfer to the Supreme Court of Missouri *en banc* (Pet. p. 10). For purposes of review by this court, the highest court of the State of Missouri is the Supreme Court *en banc*, and the divisions of that court are considered subordinate courts of the state, *Gorman* v. *Washington University*, 316 U. S. 98. The denial of the motion for transfer to the court *en banc*, without opinion, must be assumed to be for the reason that the federal questions were not properly preserved or presented, *Durley* v. *Mayo*, 351 U. S. 277, and other cases collected in 100 L. Ed. 1200. That the Supreme Court of Missouri could have based its decision on this ground is indicated by the provision of the Constitution of Missouri (Art. V, Sec. 9, Our App.), requiring mandatory transfer of a case from a division to the court *en banc* when a federal question is involved.

This point is far more than procedural quibble. Petitioners have presented a lengthy document containing isolated passages from 3,000 pages of record, in two separate cases. They have made so many claims on matters of fact, construction, and interpretation that we cannot answer them within the scope of this brief, even though there are many points of disagreement. The state court has had no opportunity to sift the record so as to resolve disputes on matters which might be material to the claimed federal issues belatedly presented.[3] The result is that this court is now asked to consider an involved constitutional argument which is admittedly not supported by any authority whatsoever, and which the courts below had no opportunity to consider, on the basis of a voluminous rec-

[3]Even in the post-decision motion, the full faith and credit argument was only number Six of seven points raised, and occupied only two of the forty-eight pages of the supporting suggestions, without the citation of a single authority.

ord and disputed allegations not resolved in the state courts. The statutes defining the jurisdiction of this court were designed to avoid such complications at this stage of the proceedings.

POINT III.

No Federal Question Is Presented by a Claim That One Not a Party to a Judgment Is Bound Thereby Because of His Relationship to the Parties Thereto.

Since Respondent was not a party to the Kansas judgment, any claim that that judgment binds Respondent cannot be based on its terms, but must depend on extrinsic facts and circumstances. Petitioners recognize this by their assertions of privity, which is a term defining the class of cases in which one not a party to a judgment bears some of its burdens, or may claim some of its benefits. *Restatement of Judgments*, Sec. 69(2). A question whether extrinsic facts or circumstances are sufficient to create a relationship of privity, so as to bind one by a judgment to which he is not a party, *is not a question of federal law.*

This was expressly held in the case of *Bagley* v. *General Fire Extinguisher Company*, 212 U. S. 477. There the point at issue was whether one on whom a notice to defend had been served was bound by a judgment to which he was not a party. This court dismissed a writ of error (available at that time to a Circuit Court of Appeals only in cases involving constitutional questions) and, speaking through Mr. Justice Holmes, said (l. c. 480):

> "If the judgment binds the defendant, it is not by its own operation, even with the Constitution behind it, but by an estoppel arising out of the defendant's contract with the plaintiff and the notice to defend. * * * The decision, in other words, turned wholly on

the construction of the contract as excluding a liability over in the event that happened. *Even if wrong, it did not deny the Michigan judgments their full effect, but denied the preliminary relation between the defendant and the party to them without which the defendant remained a stranger to them, in spite of the notice to defend.*" (Emphasis supplied).

The same principle was announced in *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111. There this court held that the state courts of Massachusetts had the right to determine for themselves whether a plaintiff could maintain an action against an alleged tortfeasor, when the same claim had been unsuccessfully presented by the same plaintiff against an alleged co-tortfeasor in a New York federal court. The Massachusetts court had ruled that the estoppel of a judgment must be mutual, and this court held that nothing in the full faith and credit clause required it to reach a contrary result.

In *Postal Telegraph Cable Company* v. *City of Newport*, 247 U. S. 464, it is said at page 475:

> "*Res judicata*, like other kinds of estoppel, ordinarily is a matter of state law, * * *."

A question purely of the construction of a foreign judgment is not a question of federal law, *Chandler* v. *Manifold*, 290 U. S. 665.

The soundness of these holdings is apparent when we consider that the keystone of full faith and credit is that a judgment must have the same effect elsewhere that it has where it is rendered, and that there is no requirement that it be given more force abroad than it has at home, *New York ex rel. Halvey* v. *Halvey*, 330 U. S. 610; *South Ottawa* v. *Perkins*, 94 U. S. 260. The court which renders a judgment determines its effect only as between the parties to it.

To determine the existence of privity, on any asserted ground, there must necessarily be a consideration of evidence dehors the judgment.

It is significant that none of the cases cited by Petitioners to illustrate the doctrine of privity involved any contention of denial of full faith and credit. In all of the cases from this court cited on pages 54 through 58 of the petition, the lower court was affirmed in its finding that there was a relationship of privity.

Here, just as in the *Bagley* case, *supra*, the claim is that a contract should be construed so as to bind Respondent to a judgment to which it was not a party. The Supreme Court of Missouri rejected the contention on the basis of the evidence before it, and its construction of the lease. Nothing in the full faith and credit clause or decisions construing it furnished any guidance. The result does not run contrary to anything ordered by the Kansas judgment, and no effect was denied to that judgment which was intended by the court rendering it. The decision of the Supreme Court of Missouri, therefore, is based on adequate non-federal grounds.

POINT IV.

The Holding of the Supreme Court of Missouri That Respondent Was Not Estopped by the Judgment Against Its Lessors in the Kansas Litigation Is Clearly Correct.

The suggestion laboriously presented at pages 34 through 40 of the petition, that the Supreme Court of Missouri mistakenly applied the doctrine of *"res judicata"* rather than the subsidiary doctrine of collateral estoppel, is neither pertinent nor helpful. As a matter of legal terminology, collateral estoppel is considered a branch

of the general law of *res judicata*, as is shown by the quotation at pages 36 and 37 of the petition from the Partmar opinion and at page 39 from *United States* v. *Silliman*, 167 F. 2d 607, and also by the very language of the petition, e. g., the top of page 35 and first paragraph commencing on page 45. The case of *McIntosh* v. *Foulke*, 360 Mo. 481, 228 S. W. 757, shows that the Supreme Court of Missouri is quite aware of the distinction between relitigation of the same cause of action, and redetermination of a fact or issue previously determined between the same parties. Both *res judicata* in general, and collateral estoppel in particular, apply only to parties to the prior litigation. Actually, the bar of pure *res judicata* is stricter than is that of collateral estoppel, since it comprehends matters which might have been litigated in addition to matters actually litigated. The opinion shows that arguments presented by Petitioners on their claim of collateral estoppel were fully considered and decided in accordance with the weight of authority.

A. The Supreme Court of Missouri Correctly Found That Any Issues Between Petitioners and Respondent in the Kansas Litigation, As to the Explosion Issue or Otherwise, Were Expressly Withdrawn by the Court at the Request of the Petitioners.

There is no need to speculate as to the intent of the Kansas federal court on the explosion issue as that issue affected Respondent. Respondent moved the court to exclude the issue as to it, and the court indicated that it would sustain the motion. To avoid this ruling, Petitioners voluntarily amended their pleading, with the assent of the court. A separate final judgment was rendered on the explosion issue, and Respondent was not a party to that judgment.

Relying on this uncontrovertable showing from the record, the Supreme Court of Missouri correctly held that the judgment in the Kansas litigation did not determine the explosion issue as far as Respondent was concerned. This is a correct application of the law, based on the following general principles:

(1) A plaintiff and a third-party defendant are not adversary parties unless an issue is framed by the pleadings on which they are on opposite sides, 2 Moore, Federal Practice, 2d Ed., Section 13.06, page 16, Section 14.17, page 443.

(2) A judgment is not determinative of an issue except as that issue arises between adversary parties, *Graham* v. *La Crosse & M. Railway Company*, 3 Wall. 704; *Cushing* v. *Laird*, 107 U. S. 69; *Radford* v. *Myers*, 231 U. S. 725, refuting Petitioners' contentions that any party to a consolidated trial is bound by everything there determined, even matters immaterial to his interest.

(3) A judgment is not determinative of an issue which was originally present in the litigation, if that issue is abandoned by the parties or withheld by the court from the scope of the judgment (authorities cited by the court below, Pet. App., p. xxxiii.)

Since the explosion issue was so withheld by the court, Petitioners' assertions about participation by Respondent in the trial of the explosion issue in Kansas do not aid them. This participation, without exception, all took place before the explosion issue was withdrawn as to Respondent, and the claims by Petitioners' counsel that the explosion judgment would bind Respondent as set out at pages 63-5 of the petition, were all made prior to that time. Respondent had been an involuntary participant on the explosion issue, following the rejection of its

objections to the third-party proceedings and of its request for separate trials. Petitioners filed a cross-claim which until amended, sought a declaration of "no explosion" against Respondent. During the trial Respondent requested the court to reconsider its denial of separate trials, as was proper (*Partmar Corp.* v. *Paramount Theaters Corp.*, 347 U. S. 89), and the trial judge changed his mind, as he well might after hearing part of the evidence. The amendment made a formal ruling unnecessary. Thereafter, not being a party to the explosion issue, Respondent had no opportunity to and could not introduce evidence of explosion, or argue the point to the jury or the court. It had no trial on this issue since it was no longer involved.

Petitioners' citation of the *Partmar* case, *supra*, as authority that Respondent could have appealed from the Kansas judgment on the explosion issue, is unsound. In that case a judgment on part of the issues was rendered in favor of Partmar, but a finding essential to this judgment was that Paramount had not violated the antitrust laws. Partmar had tendered both a defense and a counterclaim, on inconsistent theories, and was seeking holdings that the antitrust laws were not violated, so that it could retain its valuable lease, but that they were violated, so as to support a treble damage action. This court was careful to point out that Partmar had had full opportunity to be heard, and had been heard, in opposition to the challenged finding of fact, which was rendered as a necessary part of a judgment to which it was a party. In the present case the federal court did not adjudicate anything affecting Respondent on the explosion issue, or any issue at all between Petitioners and Respondent.

This court has consistently held that only a party to a judgment or decree may appeal therefrom, *Grant* v. *United*

States, 227 U. S. 74; *In re Leaf Tobacco Board of Trade*, 222 U. S. 578. A corollary is that a party to a suit, who is not a party to a final and separate decree rendered therein, has no right of appeal from such a decree. *Hanrick* v. *Patrick*, 119 U. S. 156; *Farmers Loan and Trust Company* v. *Waterman*, 106 U. S. 265. The same holding has been announced by practically every appellate court in the country and cases are collected in 4 C. J. S., Appeal and Error, Section 183(a), Section 183(b)1 and 5 C. J. S., Appeal and Error, Section 1497(b). Nothing in the *Partmar* opinion changes these principles, and the decision there is limited to rights of *parties* to a decree to appeal from findings which are necessary to that decree.

Utterly without merit is the intimation that Respondent could have appealed "in the name of its lessors." Respondent had no control over its lessors and could not have appropriated their names to appeal from the judgment on a claim which belonged only to them. Nor can an appellant allege error affecting only a non-appealing party, *Cherokee County* v. *Wilson*, 109 U. S. 621; *Chittenden* v. *Brewster*, 2 Wall. 191.

Petitioners are the parties who should be estopped on the basis of the Kansas proceeding. The conduct of their chief counsel could only have the effect of leading Respondent to believe that it was no longer affected by the explosion trial in Kansas. The result was that Respondent was induced to cease all further efforts at influencing the determination of that issue, and undoubtedly the court would not have permitted such further participation. One cannot be heard to claim that an issue was determined by a judgment when itself responsible for removing that issue from the scope of the trial.[4] "Full faith and credit"

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[4]*Cox* v. *Imes*, (Mo. App.) 219 S. W. 399, holding that a party moving for dismissal of a counterclaim cannot later contend that

should require faith and credit to the action of the judge in Kansas in unequivocally withdrawing explosion from the scope of the Kansas trial insofar as Respondent was concerned.

Petitioners' own citations show that the doctrine of collateral estoppel applies only to an issue actually litigated and determined—not to a matter which might have been litigated but was not. The Supreme Court of Missouri properly concluded that Respondent had not had a trial of the explosion issue in Kansas, and that no rule of *res judicata* or collateral estoppel is ever applied to prevent a party from having one fair trial of his case. In so holding, the Missouri court did not deny effect to anything adjudicated or intended to be adjudicated by the Kansas court—it simply refused to give the Kansas judgment an effect which the judge rendering it did not intend. This is entire compliance with the law of full faith and credit.

B. The Supreme Court of Missouri Correctly Concluded That There Was No Legal Relationship Between Respondent and Its Lessors Such As to Bind the Former by a Judgment Solely Against the Latter.

Apparently recognizing that Respondent cannot be bound by a judgment to which it was not a party, Petitioners fall back on a claim of privity. As is shown by the quotation on page 52 of the petition, the minimum requirement for the application of the concept of privity is that a

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it was adjudicated; *Frick Co.* v. *Rubel Corp.*, (D. C. E. D. N. Y.) 1 F. Supp. 100, holding that one consenting to dismissal of claim without prejudice cannot thereafter assert that the claim was determined with prejudice; also many decisions of this court holding that a party cannot subsequently take a contrary position about matters decided at his request or with his acquiescence. See, *e. g.*, *F. W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U. S. 228; *New York Elevated R. Co.* v. *Fifth National Bank*, 135 U. S. 432.

person must be so identified in legal interest with another that he can be said to represent the same legal right.

The suggestion that Respondent is in privity with its lessors, who denied all liability to Respondent and bitterly contested every item of damage claimed by Respondent, is so unreasonable, that to state the proposition is to refute it. A correlative rule which must always be observed in determining the scope of privity is that there is a denial of due process of law in binding one by a judgment to which he is neither party nor privy. *Riley* v. *New York Trust Company*, 315 U. S. 343, l. c. 354; *Postal Telegraph Cable Company* v. *Newport*, 247 U. S. 464; *Hansberry* v. *Lee*, 311 U. S. 32.

One ground of privity alleged is the assertion that the grain company "injected" the explosion issue into the Kansas litigation. This is completely refuted by the opinion below and by the record, which shows prompt objection by Respondent to the institution of the third-party proceedings which brought the explosion issue into the case. Respondent consistently contended that explosion was no part of its burden of proof in its claim against lessors, and the Kansas court so held. The jury returned a verdict in favor of Respondent there, although unable to agree on the question of explosion. References in the petition to pleadings which were amended prior to trial, and to colloquy and briefs filed in pre-trial proceedings, are out of context and wholly immaterial.

Petitioners also state as a fact that Respondent was a "real party in interest" in regard to the insurance policies issued to its lessors, and assert this as a ground of privity. Both the Supreme Court of Missouri and the Kansas federal court found that this was not so, and that Respondent had no interest in its lessors' policies. Respondent was

entitled to its judgment against lessors for all flood damage, and whether the lessors could recoup any of this from their insurance carriers concerned them alone.[5]

Petitioners also seek to make privity by saying that Respondent furnished employees as witnesses for the lessors on the explosion issue. Only one employee testified for lessors and he was subpoenaed (Estop. Exh., p. 941).

The Restatement of Judgments, Sections 78 through 111, classifies situations in which one may be bound by a judgment against another. None of these situations is even close to the present case.

Nor do Petitioners' case citations aid them in maintaining their present claims. *Lovejoy* v. *Murray*, 3 Wall. 1; and *Pelton* v. *Trico Oil Company*, (Tex. Civ. App.) 167 S. W. 2d 625, hold that one actually in control of litigation and having an interest therein may be treated as a party. In this case Respondent's lessors disputed every item of Respondent's cause of action. *Souffront* v. *La Compagnie*, 217 U. S. 475, and *Leahy* v. *Mercantile Trust Company*, 296 Mo. 561, 247 S. W. 396, hold that one who expressly authorizes another to present his claim is bound by the re-

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[5]Even if Respondent stood to benefit by a judgment in favor of the lessors on their policies, it does not follow that it would be estopped by a determination on a particular fact in the lessors' action. A judgment against a promisee in a contract does not bind a third-party beneficiary, Restatement of Judgments, § 105(b). A judgment against a representative or fiduciary is binding on the beneficiary only as to the subject matter of the representation, and does not estop the beneficiary as to a claim which the beneficiary holds in his own right. *Ibid*, Sec. 85, and particularly Illustration 6. A judgment against one cotenant does not bind other cotenants who are not parties, even though they might stand to benefit if the adjudication had been favorable, Annotation, 169 A L. R. 179.

sult, but here Respondent *objected* expressly to the third party proceedings instituted by its lessors, as is admitted by the petition (p. 11). The case of *Stout* v. *Lye*, 103 U. S. 66, simply holds that one acquiring an interest in the subject matter of litigation in progress is bound by the judgment, which is a familiar rule but utterly foreign to this case.

On pages 52 and 53, Petitioners set forth the law of class or representative suits, and cite *Sovereign Camp* v. *Bolin*, 305 U. S. 66. In such a suit a court expressly decides that persons who are not before it are bound, because their interests are adequately represented. No valid claim of representation could be made in this case, for Respondent and its lessors were adversary parties. The Kansas court was not asked to decide this case as a representative suit and did not do so. Quite the contrary—Respondent objected to being allied with its lessors, and the court dissolved the alliance. An attempt to make a case into a representative suit after judgment, when it was not prosecuted as such, finds no favor in the decisions of this court. See *Hansberry* v. *Lee*, 311 U. S. 32.

The doctrine of privity, moreover, should have no application to a situation in which the alleged privy was a party to the suit in which the judgment sought to be used against him was rendered, on issues not determined by the judgment. The effect of a judgment on parties to a suit is spelled out by its terms. Those who want a court to take particular action should file pleadings requesting that action, and a litigant is justified in assuming that issues previously excluded by an amendment, and not contained in the judgment, simply are not adjudicated. Petitioners are really seeking to amplify the Kansas judgment, on the basis of extrinsic evidence, but are unable to cite any authority allowing this to be done.

Whether the question be viewed as one of federal law or state law, the holding of the Supreme Court of Missouri that no rule of *res judicata* or collateral estoppel can be applied so as to deprive a litigant of one full and complete trial, and that there was no privity here, is entirely sound and in accordance with all authorities. Any contrary conclusion would be utterly inconsistent with general principles of justice, and undoubtedly a denial of due process.

POINT V.

The United States District Court in Kansas Had No Jurisdiction over Any Ordinary Civil Controversy Between Respondent and Petitioners, and Therefore Respondent Could Not Be Estopped by Any Determination in the Kansas Case.

The record shows that Respondent is a Missouri corporation and that one of the Petitioners, Kansas City Fire & Marine Insurance Company, is also a Missouri corporation (Tr. 1). There is no diversity of citizenship between Respondent, on the one hand, and Petitioners, on the other, and ordinary civil matters arising between them could not be litigated in the federal courts. This was expressly held by Judge Duncan in his opinion in *Hart-Bartlett-Sturtevant Grain Company* v. *Aetna Insurance Company et al.*, 108 F. Supp. 757, remanding this case to the state court after Petitioners had attempted to remove it. This point was never finally decided in the Kansas litigation, since all issues there between Petitioners and Respondent were eliminated prior to the rendition of judgment, but it is apparent that the trial judge there would agree that he had no such jurisdiction on the basis of his opinion in *Aetna Insurance Co. et al.* v. *Chicago, Rock Island and Pacific R. Co.*, 127 F. Supp. 895, affirmed (10 Cir.) 229 F. 2d 584

In Restatement of the Law of Judgments, Section 71, it is expressly declared that a judgment cannot operate by way of estoppel as to an issue which the court rendering the judgment would lack jurisdiction to determine directly.

In the present case, no United States District Court could have jurisdiction of the claim stated by Respondent's petition in the Missouri case. No federal proceedings, therefore, could operate as an estoppel against plaintiff on any issue material to that claim.

Certainly a claim for damage to grain and interruption of a grain business under an insurance policy is not in any sense ancillary to a suit involving damage to a building under a lease, so as to extend the scope of federal jurisdiction under the doctrine of *Hurn* v. *Oursler*, 289 U. S. 238.

This principle demonstrates an additional reason why the result reached by the Supreme Court of Missouri is correct.

CONCLUSION.

Certiorari should be denied.

RALPH M. JONES,
CHARLES B. BLACKMAR,
906 Commerce Building,
Kansas City 6, Missouri,
VIctor 2-9692,
Counsel for Respondent.

BLACKMAR, SWANSON, MIDGLEY, JONES & EAGER,
Kansas City, Missouri,
Of Counsel.

APPENDIX.

State Constitution, Statutes and Court Rules Involved.

(All Emphasis Added, except phrase *en Banc.*)

Constitution of Missouri, Art. V, Sec. 9:

> Section 9. Transfer of causes to supreme court *en banc.*—A cause in the supreme court shall be transferred to the court *en banc* when the members of a division are equally divided in opinion, or when the division shall so order, *or on application of the losing party when* a member of the division dissents from the opinion therein, or *a federal question is involved,* or pursuant to supreme court rule.

Missouri Revised Statutes, Sec. 509.010:

> 509.010. Shall be petition and answer—reply if answer contains counterclaim.—*There shall be a petition and an answer;* and there shall be a reply if the answer contains a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party petition if leave is given to summon a person who was not an original party; and there shall be a third-party answer, if a third-party petition is served. *No other pleading shall be required except that the court may order a reply to an answer or a third-party answer.*

Missouri Supreme Court, Rule 1.08 (a):

> 1.08—Briefs: Contents. (a) All briefs shall be printed. The brief for appellant shall contain: (1) A concise statement of the grounds on which the jurisdiction of the review court is invoked; (2) a fair and concise statement of the facts without argument; (3) *The points relied on, which shall specify the allegations of error, with citation of authorities thereunder;* provided, however, if more than three authorities are

cited in support of a point made, the three authorities principally relied on shall be cited first; and (4) An argument.

* * *

(c) The statement of the facts and the argument shall have specific page references to the transcript on appeal, or, if the transcript is printed, to the printed transcript. The respondent in his brief may adopt the statement of facts of the appellant, or, if not satisfied therewith, he shall in a concise statement correct any errors therein. *In other respects the brief of the respondent (to the extent necessary) shall follow the order of that required of the appellant.*

2.02—Transfer to the Court *en Banc*. A motion to transfer a cause under the provisions of the Constitution from either Division to the Court *en Banc* must be filed within fifteen days after the opinion of the court shall be delivered in Division and notice of the filing thereof must be served on the adverse party, or his attorney. A motion to transfer to the Court *en Banc* may be joined with a motion for rehearing and a rehearing or transfer may be prayed for in the alternative.

Extract from Statement of Points and Authorities in Brief of Respondents (Petitioners Here) in the Supreme Court of Missouri.

(This statement is required under Rule 1.08 of the Supreme Court of Missouri. The specific authorities are omitted, except under Point D, which relates to the estoppel issue.)

A.

The Trial Judge Acted Correctly in Setting Aside the Verdict, and in Sustaining Respondents' Motion for Judgment in Accordance with Their Motion for Directed Verdict, Since, in Light of the Uncontradicted Evidence, There Was No Issue of Fact Properly Submissible to the Jury.

1.

Appellant's Case Depended upon Circumstantial Evidence. Proof by Circumstantial Evidence Must Be Such That the Necessary Facts to Support a Verdict May Be Inferred and Must Reasonably Follow. The Evidence Must Be Such As to Exclude Guesswork or Speculation and Must Have a Tendency to Exclude Every Other Reasonable Conclusion. It Is Not Enough That the Evidence May Be Merely Consistent with the Desired Conclusion.

In General:

(Six authorities cited.)

Cases Involving Alleged Explosions:

(Three authorities cited.)

2.

If the Loss May Have Resulted from One of Two Causes, for One of Which and Not the Other the Defendant Is Liable, the Plaintiff Has Failed in Its Action Unless It Shows with Reasonable Certainty That the Cause for Which the Defendant Is Liable Produced the Result.

(Two authorities cited.)

3.

Even Though a Plaintiff's Proof Is Taken Most Favorably to It, the Law Will Not Tolerate Forced or Speculative Inferences.

(Two authorities cited.)

4.

Upon the Only Direct Evidence As to the Movement of the Metal Hopper Bottoms, It Was Established, Without Contradiction That Such Hopper Bottoms Were Disengaged Slowly and Gradually Because of the Swelling of the Wet Grain. The Gradual and Piecemeal Release of Such Pressure, Followed Ultimately by the Hopper Bottoms Dropping to the Floor Below, Was a Continuous Occurrence Which Must Be Viewed As an Entirety. Measured As an Entirety, Such Occurrence Did Not Possess Either Suddenness or Instantaneous Reaction. Such Occurrence Was Not an Explosion.

(Four authorities cited.)

5.

Undisputed Documentary Evidence Also Sustained Respondents' Theory.

See argument.

6.

The Trial Court Properly Set Aside the Verdict, Because Plaintiff's Evidence As to Damages Failed to Separate, with Certainty Those Damages Admittedly Attributable to the Flood Alone, from the Damages Which Plaintiff Claims Were the Result of the Alleged Explosions.

(Four authorities cited.)

7.

It Is a Judicial Function to Determine Whether the Evidence Is Substantial, and If It Is Not, There Is Nothing for the Jury to Decide.

(One authority cited.)

8.

The "Scintilla" Rule Does Not Apply in Missouri.

(One authority cited.)

B.

Appellant Does Not Assign Any Error on This Appeal with Respect to the Exclusion of Any Evidence Offered by It at the Trial. Appellant Is Not Entitled to the Benefit of Any Such Excluded Evidence in Connection with the Issues Raised upon This Appeal.

Supreme Court of Missouri Rule 3.23.
(One authority cited.)

1.

There Is a Presumption That the Trial Court's Rulings on Evidence Were Correct.
(One authority cited.)

2.

The Evidence As to What Happened in Other Elevators, Particularly in Situations Wholly Lacking in Similitude, Was Properly Rejected by the Trial Court.
(One authority cited.)

3.

Even If the Trial Court Erroneously Refused Certain Evidence Proffered by Plaintiff, Such Ruling Does Not Remedy Plaintiff's Lack of Affirmative Proof.
(One authority cited.)

C.

If the Court Should Reverse the Judgment, the Verdict Should Not Be Reinstated, Because the Trial Court Erred in Not Sustaining, in the Alternative, Defendants' Motion for New Trial. Defendants' Alternate Motion for New Trial Was Predicated upon the Following Valid Grounds: (a) Plaintiff's Evidence As to Damages Failed to Separate, with Certainty, Those Damages Admittedly Attributable to the Flood Alone, from the Damages Which Plaintiff Claims Were the Result of the Alleged Explosions; (b) There Was No Evidence As to

Damages, Sufficient to Support the Verdict on Either Count of the Petition; (c) The Trial Court Erred in Giving Plaintiff's Instructions Numbers 2 and 3, Relating to Damages, Since There Was No Evidence to Support Either of Said Instructions; (d) The Trial Court Erred in Failing to Admit into Evidence Defendants' "Estoppel Exhibit"; (e) the Trial Court Erred in Failing to Recognize That the Verdict on Counts I and II of the Petition Was Excessive and Improper, Because It Was Not Supported by the Evidence.

(One authority cited.)

D.

The Trial Judge Properly Held That the Appellant Was Precluded from Relitigating the Explosion Issue.

McIntosh v. *Foulke*, 360 Mo. 481, 228 S. W. 2d 757.

Taylor v. *Sartorious*, 130 Mo. App. 23, 108 S. W. 1089, 1094.

Restatement of Judgments, Sec. 83.

Bruzewski v. *United States*, 181 F. 2d 419, 422, 423.

Young v. *Byrd*, 124 Mo. 590, 28 S. W. 83, 84.

Healy v. *Moore*, (Mo. App.) 100 S. W. 2d 601, 605, 606.

Hall v. *Wilder Mfg. Co.*, 316 Mo. 812, 293 S. W. 760, 766.